

No. 89-1782-CFX
Status: GRANTED

Title: Edgar Blatchford, Commissioner, Department of
Community and Regional Affairs of Alaska, Petitioner
v.
Native Village of Noatak and Circle Village

Docketed:
May 14, 1990

Court: United States Court of Appeals
for the Ninth Circuit

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Daniel, Carol, Walleri, Michael J.

NOTE: See mail label re dock dt DUE 051390-SUN
033089 op. withdrawn-Frank stated no need to print

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|--|
| 1 | May 14 1990 | G | Petition for writ of certiorari filed. |
| 3 | Jun 8 1990 | | Order extending time to file response to petition until July 16, 1990. |
| 4 | Jun 8 1990 | | The above extension is for all respondents. |
| 5 | Jul 16 1990 | | Brief of respondent Native Village of Noatak and Circle Village in opposition filed. |
| 7 | Jul 16 1990 | | Brief amici curiae of Alabama, et al. filed. |
| 8 | Jul 16 1990 | | Brief of respondent Circle Village in opposition filed. |
| 6 | Jul 18 1990 | | DISTRIBUTED. September 24, 1990 |
| 9 | Sep 18 1990 | X | Supplemental brief of respondent Native Village filed. |
| 10 | Oct 1 1990 | | Petition GRANTED. ***** |
| 11 | Nov 13 1990 | | Brief amici curiae of Alabama, et. al. filed. |
| 12 | Nov 15 1990 | | Joint appendix filed. |
| 13 | Nov 15 1990 | | Brief of petitioner David Hoffman filed. |
| 14 | Nov 15 1990 | | Brief amici curiae of Council of State Governments, et al. filed. |
| 15 | Nov 23 1990 | | Record filed. |
| | | * | Certified copy of original record, box, received. |
| 16 | Nov 29 1990 | | Record filed. |
| | | * | Certified copy of C. A. Proceedings received. |
| 17 | Dec 17 1990 | | SET FOR ARGUMENT TUESDAY, FEBRUARY 19, 1991. (4TH CASE) |
| 18 | Dec 17 1990 | | Five lodgings received. |
| 19 | Dec 17 1990 | | Brief of respondent Native Village of Noatak filed. |
| 20 | Dec 17 1990 | | Brief amicus curiae of Metlakatla Indian Community filed. |
| 21 | Dec 17 1990 | | Brief amici curiae of Native Village of Tanana, et al. filed. |
| 22 | Dec 17 1990 | | Brief of respondent Circle Village filed. |
| 23 | Dec 17 1990 | | Brief amici curiae of Miccosukee Tribe of Indians in Florida, et al. filed. |
| 24 | Jan 10 1991 | | CIRCULATED. |
| 25 | Jan 28 1991 | X | Reply brief of petitioner Hoffman filed. |
| 26 | Feb 19 1991 | | ARGUED. |

89-1788

No. 89-__

Supreme Court, U.S.
FILED

MAY 14 1990

ROBERT F. SPANGL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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May 14, 1990

QUESTIONS PRESENTED

1. Did the states give up their immunity under the Eleventh Amendment when sued by an Indian tribe in federal court by consenting to be bound by the Commerce Clause of the United States Constitution upon entry into the Union?

2. Is an Indian group automatically a tribe for purposes of 28 U.S.C. § 1362 (federal jurisdiction over suits by Indian tribes) because it has received the same treatment as an Indian tribe in or received benefits under certain federal statutes?

3. Is there a federal question presented when a state statute providing state benefits to unincorporated communities with Native village governments is altered to avoid a state constitutional violation by making the state benefits available to all unincorporated communities, including those with Native village governments?*

* This is an alternative question. See fn. 11 *infra*.

LIST OF PARTIES

Petitioner:

David Hoffman, Commissioner, Department of Community and Regional Affairs, State of Alaska

Respondents:

Native Village of Noatak

Circle Village

Other plaintiffs in the Proceedings below in District Court:

Native Village of Akiachak

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No. 89-__

In The

Supreme Court of the United States

October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

On behalf of the people of the State of Alaska, David Hoffman, Commissioner, Department of Community and Regional Affairs, State of Alaska, respectfully petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit opinion is reported at 896 F.2d 1157 (Appendix A, App. A-1). The October 28, 1987, Order of

the United States District Court for the District of Alaska, filed December 1, 1987, is unpublished (Appendix B, App. B-1).

JURISDICTION

On March 30, 1989, the Ninth Circuit issued an opinion reversing the decision of the United States District Court for the District of Alaska. The State of Alaska filed a petition for rehearing, and on February 12, 1990, the Ninth Circuit withdrew its March 30, 1989, opinion, denied the petition for rehearing, rejected a suggestion for rehearing en banc, and issued an amended opinion. *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Alaska legislature enacted a statute giving financial aid to unincorporated communities with Native councils [Alaska Statute 29.89.050]. On the advice of the Alaska Attorney General that this statute violated several provisions of the Alaska Constitution because it denied similar benefits to unincorporated communities without Native councils, the State broadened the program to extend aid to all unincorporated communities.¹ Several off-

¹ After the revenue-sharing program was expanded in 1981 to include all unincorporated communities, the

(Continued on following page)

reservation Native councils, including the Native Village of Noatak ("Noatak") and Circle Village,² sued the State in U.S. District Court, alleging that the State's decision to broaden the program violated the equal protection guarantees of the U.S. Constitution and several aspects of state law.³ The District Court dismissed for lack of

(Continued from previous page)

legislature continued to appropriate funds for all the eligible communities in the expanded class. The fact that each community received less than the \$25,000 authorized maximum was not due to expansion of the program, as the legislature appropriated funds for the full number of eligible villages under the expanded program. The legislature has always chosen, for its own fiscal reasons, to short-fund this revenue-sharing program. The state offered proof of these facts below. No evidence to the contrary was offered.

² Noatak is an unincorporated community with a Native council (the Native Village of Noatak) organized under the Alaska amendment to the Indian Reorganization Act. It has existed since before the first non-Natives came to Alaska. Circle is an unincorporated community founded in 1887 as a supply town for gold rush miners. Today Circle has both an unincorporated Native council (the Circle Village Council) and a multi-racial civic association (the Circle Civic Community Association). Both communities have Native majorities and non-Native minorities. Neither community is on or near an Indian reservation.

³ The Native villages' sole theory under federal law was that by adding other communities to the program, the State deprived the villages with Native councils of the exclusive right to the available funds and that denial of the exclusive benefit was made on an improper discriminatory basis, i.e., solely because they were Indians. As stated in Judge Kozinski's dissent below, 896 F.2d at 1166, this claim – that it violates federal law by *not* treating Indians and non-Indians differently – is frivolous and so does not support federal question jurisdiction.

jurisdiction because the villages' suit against the state was barred by the Eleventh Amendment or, alternatively, because no federal question was presented.

The Ninth Circuit Court of Appeals reversed, ruling that Noatak and Circle Village were tribes for purposes of 28 U.S.C. § 1362, which gives federal courts jurisdiction over suits by tribes, because Noatak was organized under the Alaska amendment to the Indian Reorganization Act (25 U.S.C. § 473a), and because both Noatak and Circle Village received the same treatment accorded tribes in some federal statutes and were listed as "Native villages" in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 et seq. In so ruling, it rejected prior decisions of the Ninth Circuit and other circuits that tribal status must be proven by a detailed factual inquiry.⁴ The Court of Appeals also reversed the district court with respect to whether the Eleventh Amendment applies to suits by tribes, squarely rejecting a decision by the Eighth Circuit that the Eleventh Amendment does bar such suits⁵ and glossing over dicta to the same effect in two decisions of this Court.⁶ Finally, the Ninth Circuit ruled that

⁴ The State believes that the Native Village of Noatak probably could meet the criteria in federal law for recognition as a tribe, but has serious doubts as to whether Circle Village could meet those criteria. The State's point is that it was improper for the Ninth Circuit panel to find *automatic* tribal status merely because some but not all federal statutes treat the villages as tribes for certain purposes.

⁵ *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974).

⁶ *Arizona v. California*, 460 U.S. 605, 614 (1983); *United States v. Minnesota*, 270 U.S. 181, 193-195 (1926).

a federal question was presented in this case, thus providing jurisdiction under 28 U.S.C. § 1362. The State petitioned for rehearing; the petition was denied on February 12, 1990.

REASONS FOR GRANTING THE WRIT

A. Summary

The decision of the Ninth Circuit will affect every State by denying each of them what had previously been assumed to be a constitutional protection, the right to be free from suit in federal court in the absence of consent or without an explicit abrogation of that right by Congress. It will affect each of hundreds of tribes and other Indian organizations in the country by creating a new standard by which an Indian group may achieve tribal status, and by giving each such group the right to sue states in federal court, a right that is usually denied to any entity other than the United States. The decision also directly conflicts with prior decisions of the Eighth Circuit and the Ninth Circuit, and with dicta in prior decisions of this Court.

B. Reasons

1. Impact of the Decision on the States. The decision will affect every State in the Union. The holding on the Eleventh Amendment will expose every State to suit in federal court by tribes, despite the fact that tribes have never before been recognized as exempt from the applicability of the Eleventh Amendment. Moreover, the logic

the court used – that the States waived immunity from suit by agreeing to a Constitution which mentions federal power over Indian matters – could be extended to other contexts, such as admiralty and interstate commerce, where this Court has already refused to recognize an exemption from the Eleventh Amendment.⁷ This means the result of the court's approach may eventually affect an even greater group of potential plaintiffs than just Indian groups. Finally, the impact on the States will be exacerbated because the Ninth Circuit did not limit itself to suits by tribes recognized under existing law. Instead, it said that for jurisdictional purposes a much larger group of Indian organizations are considered "tribes."⁸ The potential impact on States is, by any measure, major.

⁷ *Welch v. Texas Department of Highways and Public Trans.*, 483 U.S. 468, 107 S. Ct. 2941 (1987) (interstate commerce); *Ex Parte New York*, No. 1, 256 U.S. 490 (1921) (admiralty).

⁸ The State of Alaska's greatest concern relates not to tribal status itself, but with the potential proliferation of enumerated tribal powers in the off-reservation environment of Alaska. The assertion of tribal governmental powers where there are no reservation boundaries and Natives and non-Natives live side by side raises more than the possibility of conflict. For example, this Court already has pending before it a petition for certiorari in *Donald Puckett, et al. v. Native Village of Tyonek, et al.*, No. 89-609. In *Puckett*, this Court is asked to review a Ninth Circuit decision upholding a non-reservation Alaskan Native village ordinance which constructively evicts non-members from the village of Tyonek by denying them housing. On April 16, 1990, the Solicitor General was asked to provide the views of the federal government on this issue.

2. Impact of the Decision on Indian groups. The Ninth Circuit decision is also significant because it may affect a substantial number of Indian groups all over the United States. In effect, the Ninth Circuit has changed the rules for determining how tribes are defined under federal law. At the least, the decision will foster uncertainty regarding the type and amount of funding that will be available to Indian groups throughout the Nation by adding an unknown number of new "tribes" to the pool of present recipients. Finally, the decision will dramatically expand the universe of "tribal" plaintiffs that will have access to the federal courts against states as well as other defendants.

3. Direct conflicts within and among the Circuits. The ruling of this Ninth Circuit panel directly conflicts with the decision of the Eighth Circuit in *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974), regarding the Eleventh Amendment. The Ninth Circuit in its opinion admitted as much, without even attempting to rebut the logic and interpretation of the *Dorgan* court. *Noatak*, 896 F.2d at pages 1161-1162. The ruling also conflicts with two other decisions by other panels of the Ninth Circuit, *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988), and *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985).

In *Venetie* the Ninth Circuit rejected the claim that tribal status should be found merely because the Indian group was organized under a federal statute or had received benefits under some federal legislation intended primarily to benefit tribes. The court concluded that tribal status must be shown by a detailed factual examination of whether the group met the tribal recognition criteria

set out in federal law. The *Price* decision is in accord, even referring to the governing federal regulations as the factors to be considered in evaluating tribal status. See 25 C.F.R. Part 83. See also *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582-88 (1st Cir. 1979).

Finally, as to permitting such groups an exemption from the applicability of the Eleventh Amendment, the decision conflicts with recent decisions by this Court on Eleventh Amendment immunity. As recently as last summer, this Court stated that an abrogation of a state's immunity by Congress must be unmistakably clear and textual. *Dellmuth v. Muth*, ___ U.S. ___, 109 S. Ct. 2397 (1989). See also *Pennsylvania v. Union Gas Co.*, ___ U.S. ___, 109 S. Ct. 2273 (1989). Otherwise, a state is immune from suit in federal court unless it has consented to the suit. This Court has not recognized an exemption from Eleventh Amendment immunity for matters subject to federal oversight by the Constitution. In fact, it has rejected such arguments in cases involving interstate commerce and admiralty. See *Welch v. Texas Department of Highways and Public Trans.*, 483 U.S. 468, 489, 107 S.Ct. 2941, 2954 (1987) (interstate commerce); *Ex Parte New York*, No. 1, 256 U.S. 490 (1921) (admiralty). The decision below runs directly counter to those cases and could subject the states to suit in the federal courts in any area in which Congress has authority under article I, section 8 of the Constitution.

4. The Decision is Wrong on its Merits.

(a) The Indian Commerce Clause provides no basis for eliminating the States' sovereign immunity from suits by tribes.

The Ninth Circuit has misinterpreted the Indian Commerce Clause and misapplied the Eleventh Amendment. Under the Eleventh Amendment, a state normally

enjoys sovereign immunity from suit in a federal forum, unless it specifically waives the immunity or that immunity is abrogated by a specific act of Congress. Waiver by a state is not to be inferred simply because it has consented to suits in its own courts. *Port Authority of Trans-Hudson Corp. v. Feeney*, ___ U.S. ___, 1990 USLW 51955 (April 30, 1990); *Florida Department of Health and Rehabilitative Services v. Florida State Nursing Home Assoc.*, 450 U.S. 147, 67 L.Ed.2d 132, 101 S. Ct. 1032 (1981). Congress can abrogate a state's sovereign immunity protected by the Eleventh Amendment, but must do so expressly and with "unmistakenly clear" intent. *Dellmuth v. Muth*, ___ U.S. ___, 109 S. Ct. 2397 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985).

It is undisputed that the State of Alaska has not waived its sovereign immunity from suit in this case. And there has been no Congressional abrogation of the state's sovereign immunity from suit by tribes in 28 U.S.C. § 1362 or elsewhere. Indeed, even the Ninth Circuit agreed. *Noatak*, 896 F.2d at 1162.

However, in this case, the Ninth Circuit took a different approach and declared that a state has no immunity from suit by an Indian tribe because each state consented to suit upon admission to the union by virtue of the acceptance of the Commerce Clause's grant of authority of Congress "to regulate commerce with the Indian tribes." U.S. Const. Art. I, Sec. 8, cl. 3. This Court has previously rejected that logic when it was argued that the Eleventh Amendment did not apply to other matters within the Constitutional authority of Congress. See *Welch v. Texas Department of Highways and Public Trans.*, 483 U.S. 468, 489, 107 S. Ct. 2941, 2954 (1987) (interstate commerce); *Ex Parte New York*, No. 1, 256 U.S. 490 (1921) (admiralty).

Moreover, the theory defies historical logic. When the Constitution was written, Indian tribes were not among the parties identified as being able to bring suit in federal courts. *Cherokee Nation v. The State of Georgia*, 5 Pet. 1 (1831). As stated by Chief Justice Marshall:

These considerations go far to support the opinion that the framers of our Constitution had not the Indian tribes in view when they opened the courts of the Union to controversies between a State or the citizens thereof, and foreign states.

5 Pet. at 18.

Since the federal courts were not open to the Indian tribes at the time of adoption of the Constitution, the Ninth Circuit's conclusion that a constitutional clause regulating commerce with Indian tribes signifies a state's consent to suit by an Indian tribe is not logically supportable. As this Court stated in *Monaco v. Mississippi*, 292 U.S. 313 (1934):

There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention." The Federalist, No. 81. The question is whether the plan of the Constitution involves the surrender of immunity when the suit is brought against a State, without her consent, by a foreign State.

292 U.S. at 322 (footnote omitted).

In *Monaco*, this Court decided it was in the plan of the convention that absent consent, a state was immune from suit by a foreign country and simply by entering the Union, a state did not so consent. Yet suits between a

state and a foreign country were directly identified in article III of the constitution as subject to federal judicial authority. How odd then that, according to the Ninth Circuit, a state consented to suit by Indian tribes by consenting to be bound "by the plan of the convention" when that plan did not even provide the tribes with access to the federal court system, much less the explicit right to sue a state.

Contrary to the Ninth Circuit's view, *Noatak*, 896 F.2d at 1164, the balance of federalism between the states and the United States regarding federal judicial power that was struck in 1789 did not account for Indian tribes. Congress' enactment of 28 U.S.C. § 1362 in 1966 did not change that balance, and did not authorize federal court suits by tribes against states. That statute contains no clear unmistakable abrogation of state immunity, and therefore cannot be read under *Dellmuth* to authorize federal court actions against states.

In short, the Ninth Circuit's analysis turns the real balance of federalism upside down. Indeed, under the Ninth Circuit's novel view, the federal courts have jurisdiction over *any* case brought by an Indian tribe against a state, even if the only legal question (other than the tribe's status as a federally recognized tribe) is purely a matter of state law. Nothing in 28 U.S.C. § 1362 can be read to open the federal courts' doors so widely.

- (b) Tribal status cannot be based on merely being identified in or receiving benefits under certain federal statutes intended primarily to assist Native Americans.

The State of Alaska does not deny the existence of tribes in Alaska. In fact, the State of Alaska believes that a

majority of the Native villages listed in § 11(b)(1) of the Alaska Native Claims Settlement Act may well meet the criteria in 25 C.F.R. Part 83 for achieving tribal status.⁸ As indicated in earlier decisions of the Ninth Circuit, there are well established criteria for determining whether a particular Indian group is a tribe. *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985). Those criteria include express statutory recognition, recognition by demonstrating that the group complies with standards under 25 C.F.R. § 83.7, or in some cases meeting criteria used by the Bureau of Indian Affairs before the adoption of regulations in 25 C.F.R. Part 83. *Price*, 765 F.2d at 627-628.

In this case, the state believes that Noatak may qualify as a tribe under federal law for certain purposes, though it has serious doubts about the claim of Circle Village. The state disagrees, however, with the holding of the Ninth Circuit that Indian groups in Alaska or elsewhere, and in the absence of express federal recognition, are not required to demonstrate tribal status by adhering to the federal acknowledgment process (25 C.F.R. Part 83) or by convincing a court that they meet the factual requirements of those regulations.

⁸ As early as 1988, in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988), the State of Alaska, as amicus curiae, told the Alaska Supreme Court the State believed that tribes may exist in Alaska, even though the Alaska Supreme Court eventually ruled otherwise. *Native Village of Stevens*, 757 P.2d at page 34 (Stevens Village does not have sovereign immunity because it, like most Native groups in Alaska, is not self-governing or in any meaningful sense sovereign).

The Ninth Circuit first decided that just because Noatak is organized under the Alaska amendment to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 473a, it is a tribe for the purpose of asserting jurisdiction under 28 U.S.C. § 1362. Yet the Ninth Circuit failed to reconcile the *Noatak* decision with its 1988 decision in *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir 1988).

In *Venetie*, the Ninth Circuit stated that "the language of the IRA's Alaska amendment, 25 U.S.C. § 473a, raises doubts as to whether IRA organization should be construed so conclusively in the case of Alaska Natives." 856 F.2d at 1387.⁹ That doubt was, and still is justified.

⁹ In *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), the Ninth Circuit previously indicated its belief that IRA organization for non-Alaskan Indians under 25 U.S.C. § 476 was conclusive evidence of tribal status. Thus, while organization under the IRA for a lower 48 tribe, under the restrictive language of 25 U.S.C. § 476, is clear indication that the group is a tribe because *only tribes are eligible under that section*, in Alaska organization under the IRA is not conclusive as to the tribal status of a particular group. Under the Alaska amendment to the IRA, Native groups that are not Indian tribes are expressly authorized to adopt a constitution:

groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

25 U.S.C. § 473a (emphasis added).

Incorporation under the Alaska amendment to the IRA cannot be taken as conclusive of tribal status for another reason. Under the federal rules for recognition of tribes, an Indian can be a member of only one tribe. 25 C.F.R. § 83.7. Under the Alaska amendment to the IRA, a person may clearly be a member of more than one IRA entity.

Many Alaskan IRA councils were also formed in modern times as voluntary organizations, and not as successors to traditional political groups; presumably these IRA's would not qualify as tribes under *United States v. Mazurie*, 419 U.S. 544 (1975), and *Price*. See also *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979). Yet the Ninth Circuit ruling in *Noatak* apparently says they do qualify.

The Ninth Circuit also concluded that, because Noatak and Circle Village are listed in the Alaska Native Claims Settlement Act (ANCSA) as "Native villages," each is a tribe. That conclusion conflicts with the clear language of ANCSA which states that the term " 'Native village' means any tribe, band, clan, group, village, community, or association in Alaska." 43 U.S.C. § 1602(c).

Finally, in what may or may not have been an independent basis for deciding that Noatak and Circle Village are tribes for the purpose of 28 U.S.C. § 1362, the Ninth Circuit ruled that because Noatak and Circle Village received the same treatment as tribes in certain federal legislation, they are tribes for purposes of 28 U.S.C. § 1362. The Ninth Circuit said that "the nature, and scope of the federal government's relationship with the Native

Villages, as evidenced by these Acts indicates that the recognition [of tribal status] extends to legal claims." *Noatak*, 896 F.2d at 1160.

However, as the Ninth Circuit itself recognized, those statutes are all prefaced by the phrase "[f]or the purpose(s) of this chapter." Such a limitation makes the leap to general tribal recognition inappropriate. Moreover, it ignores the fact that Congress has also passed legislation – such as the recent amendments to the Clean Water Act – that exclude off-reservation Alaska Native villages from treatment as tribes (33 U.S.C. §§ 1377(g), (h)), and other legislation that clearly distinguishes between tribes and Alaskan Native villages, e.g., the Resource Conservation and Recovery Act, 42 U.S.C. § 6903(13)(A).¹⁰

Thus, if any conclusion can be reached from federal statutes, it is that Congress has always carefully avoided making Alaskan Native villages tribes for all purposes simply because they may be defined as tribes for the purpose of specific federal programs. While some of them may well be tribes, it is improper to conclude that they are all tribes, as a matter of law, merely because Congress has recognized them as such for certain specific purposes.

¹⁰ As other examples of Congress *not* treating Alaskan Native villages as tribes for all purposes, see the Indian Self-Determination Act, 25 U.S.C. § 450b(e); Indian Financing Act, 25 U.S.C. § 1452(b); and the Indian Tribal Governmental Tax Status Act, 26 U.S.C. § 7701(a) (40) (A). Significantly, the most recent amendments to the Alaska Native Claims Settlement Act also contain a disclaimer of any intent to validate claims of sovereign authority (P.L. 100-241, § 17(a), 101 Stat. 1788).

(c) There is no federal question in this case.¹¹

In the final issue on appeal, the Ninth Circuit ruled that the federal question presented by Noatak and Circle Village (i.e., that the expansion of the revenue sharing program to include all unincorporated communities was racially motivated and thus was not proper) was not "plainly meritless," and therefore, the federal courts have jurisdiction under 28 U.S.C. § 1362. *Noatak*, 896 F.2d at 1165.

Noatak and Circle Village argued below that states may single out Indian tribes and their members for special treatment, so the actions taken by the State of Alaska to expand the program were somehow impermissible under the Fourteenth Amendment, even though those actions had the effect of providing revenue sharing on an

¹¹ Even though this question apparently does not satisfy this court's certiorari criteria, it is presented *alternatively* in the event the Court deems correct the view expressed by Judge Kozinski, dissenting below, that the absence of a federal question is so clear that the complaint should have been dismissed on this ground without reaching the other issues. Although we agree with Judge Kozinski, we are *not* urging this Court to vacate the judgment with directions to affirm the district court on this alternative ground alone. While that theoretically would remove this case as a binding precedent, the decision would still have substantial practical effect both within the circuit and perhaps elsewhere. Our primary submission, accordingly, is that the Court grant certiorari on the first two questions presented, and perhaps discuss the lack of a federal question while addressing the Ninth Circuit's novel approach to Eleventh Amendment jurisprudence, which apparently does not require a federal question when the case is brought by Indian tribes.

equal basis to an expanded set of communities in rural Alaska. The argument is without merit for at least three reasons. First, the expanded class of communities in rural Alaska that received revenue under this program received virtually the same amount per community as the Native villages received by themselves prior to the expansion.

Secondly, it is illogical to assert that racial discrimination has occurred by actions which spread revenue sharing benefits among a larger (and more equal) class of similarly situated communities. As Ninth Circuit Judge Kozinski stated in dissent in *Noatak*:

The villages' purported federal claim is that the state, once having decided to favor Indians over other citizens, is now precluded from treating them the same. As a matter of federal equal protection, this claim is frivolous: I am aware of no constitutional provision that requires a state to treat Indians and non-Indians differently. While the equal protection clause may permit states to favor Indians, it certainly does not compel it.

Noatak, 896 F.2d at 1167 (emphasis in original).

Third, since states do not have a trust relationship with tribes, it is doubtful that they can provide benefits only to Indians without violating state equal protection provisions. *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463, 500 (1979); *Queets Band v. State of Washington*, 765 F.2d 1399, 1404 (9th Cir. 1985).

Noatak and Circle Village also argued, and the Ninth Circuit agreed, that a cause of action in this case included violations of federal law and policy intended to further

tribal self-government. However, Noatak and Circle never showed how it impedes their self-government for the state to give other communities the same benefits it gives to Native communities, nor have they ever identified any federal law or policy which is frustrated by equal revenue sharing

Equally important, the alleged violation is dependent on finding a violation of state law only: there is nothing in federal law that requires states to share revenue with Indian groups – which Noatak and Circle concede – and there is certainly nothing in federal law that requires the state to give public benefits to Indian groups and deny the same benefits to others. The mere fact that the state required the funds to be used or not used for certain public purposes is the prerogative of the provider. To label that as an infringement on tribal self-government is to assume that the money was provided for the purpose of furthering tribal self-government in the first place. Tribal self-government is not an issue in this case, because the purpose of the state program was not to further tribal self-government. The provision of funds to rural communities to help support community services was the reason for the program.

Most importantly, even if there is some implication or allegation of a federal question in this case, there must be some basis and substance behind it. As this Court has stated more than once:

“[T]he federal courts are without power to entertain claims otherwise within their jurisdiction if they are ‘so attenuated and unsubstantial as to

be absolutely devoid of merit,’ ‘wholly insubstantial,’ ‘obviously frivolous,’ ‘plainly unsubstantial,’ or ‘no longer open to discussion.’ ”

Noatak, 896 F.2d at 1166 (Judge Kozinski dissenting) (quoting *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974) (citations omitted)). Such are the “federal questions” in this case.

CONCLUSION

For the foregoing reasons, the Ninth Circuit’s decision should be reviewed and reversed by this Court. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DOUGLAS B. BAILY
Attorney General
State of Alaska

By: GARY I. AMENDOLA
Assistant Attorney General
Counsel of Record

Office of the Attorney General
State of Alaska
Department of Law
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May 14, 1990

**APPENDIX A
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

NATIVE VILLAGE OF
AKIACHAK, NATIVE
VILLAGE OF NOATAK,
AND CIRCLE VILLAGE ON
BEHALF OF THEMSELVES
AND ALL OTHERS
SIMILARLY SITUATED,

**JUDGMENT IN
A CIVIL CASE**

**CASE NUMBER
A85-503**

Plaintiffs,

v.

EMIL NOTTIE, AS COMMISSIONER
OF DEPARTMENT OF
COMMUNITY AND REGIONAL
AFFAIRS, STATE
OF ALASKA,

Defendants.

- [] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- [x] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT Plaintiffs' claims are dismissed, with prejudice as to federal court, but without prejudice to their being filed again in state court.

APPROVED:

/s/ Andrew J. Kleinfeld 11/5/87
U.S. DISTRICT JUDGE

A-2

/s/ November 5, 1987 JoAnn Myres
 Date Clerk

cc: Lawrence Aschenbrenner
 Michael Walleri
 Hal Brown (AAG) /s/ Pam Richter
 O & J 3219 (By) Deputy Clerk

A-3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | | |
|----------------------------|---|----------------|
| NATIVE VILLAGE OF |) | |
| AKIACHAK, NATIVE VILLAGE |) | |
| OF NOATAK, AND CIRCLE |) | |
| VILLAGE ON BEHALF OF |) | |
| THEMSELVES AND ALL |) | |
| OTHERS SIMILARLY SITUATED, |) | ORDER |
| |) | (Filed |
| Plaintiffs, |) | Oct. 29, 1987) |
| vs. |) | |
| EMIL NOTTIE, AS |) | |
| COMMISSIONER OF |) | |
| DEPARTMENT OF COMMUNITY |) | |
| AND REGIONAL AFFAIRS, |) | |
| STATE OF ALASKA, |) | |
| Defendants. |) | |

A85-503 CIV

For the reasons stated during and at the conclusion
of oral argument on October 28, 1987,

IT IS ORDERED that:

(1) Plaintiffs' claims are dismissed, with prejudice as
to federal court, but without prejudice to their being filed
again in state court.

(2) The preliminary injunction previously issued in
this case is dissolved.

(3) Plaintiffs have 30 days to move for an award of
any amounts which should be paid out of the bond
posted as security for the preliminary injunction.

A-4

DATED at Anchorage, Alaska this 29 day of October,
1987.

/s/ Andrew J. Kleinfeld
ANDREW J. KLEINFELD
United States District Judge

cc: Michael J. Walleri
Hal Brown (AAG)

A-5

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

| | | |
|--------------------|---|-------------------------|
| NATIVE VILLAGE OF |) | Case No. A85- |
| AKIACHAK, NATIVE |) | 503 Civil |
| VILLAGE OF NOATAK, |) | Anchorage, Alaska |
| and CIRCLE |) | Wednesday, October |
| VILLAGE COUNCIL, |) | 28, 1987 1:30 O'Clock |
| |) | P.M. |
| Plaintiffs, |) | |
| vs. |) | Oral Argument on |
| |) | Defendant's Motion |
| DAVID HOFFMAN, AS |) | to Dismiss, Plaintiff's |
| COMMISSIONER OF |) | Motion for Partial |
| DEPARTMENT OF |) | Summary Judgment |
| COMMUNITY AND |) | and Defendant's |
| REGIONAL AFFAIRS, |) | Cross-Motion for |
| STATE OF ALASKA, |) | Summary Judgment |
| |) | |
| Defendants. |) | BEFORE ANDREW J. |
| |) | KLEINFELD U.S. |
| |) | DISTRICT COURT |
| |) | JUDGE |

(Filed Dec. 1, 1987)

APPEARANCES:

For Plaintiffs: LAWRENCE A. ASCHENBRENNER
Native American Rights Fund
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For Defendants: DOUGLAS MERTZ
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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

* * *

(p. 37) THE COURT: Thank you, Mr. Aschenbrenner. I'll rule on the motion to dismiss at this time.

The lawsuit here is by Native Village of Akiachak, the Native Village of Noatak and Circle Village. It's apparent on the face of the complaint, as well as the cognizable evidence subsequently submitted that the Native Village of Akiachak has no standing here.

The state law, which is the underlying issue in this case, relates to native - to villages which are not incorporated as a city. Akiachak was incorporated. The ground for putting its into the complaint was that it was anticipated by the Plaintiffs that by the time the complaint came to a decision, Akiachak would no longer be incorporated. That didn't turn out to be so. So as to Akiachak, the claims must be dismissed for lack of jurisdiction. The standing is jurisdictional.

As to Circle Village, since there was no application for the funds during '82, '83 and '84, Circle Village has no standing to challenge the administration of the program

during those years. However, that leaves in Noatak, and it leaves in Circle Village for Fiscal Year 1985.

(p. 38) For there to be jurisdiction, there has to be some exception to applicability of the 11th Amendment. The lawsuit is against the Commissioner for the State, and the State itself. The remedies sought would be paid out of the State Treasury.

The injunction sought by the Plaintiffs would order the Commissioner to pay over \$853,587.51 in revenue sharing funds, which on the face of the complaint are State monies. The final judgment sought by the Plaintiffs would be in part declaratory, but the value of the declaratory judgment would be that it would support a payment of monies out of the State Treasury. In addition, interest is sought.

So on its face, this is a suit by parties seeking to impose a liability which must be paid for public funds in the State Treasury, and would therefore be barred by the 11th Amendment.

Since the program no longer exists in its previous form, there can be no threat of future action which is the subject of this lawsuit, the lawsuit relates entirely to payment of money in the past.

There is no showing that the State has waived its sovereign immunity with respect to suits in federal court, although it may have waived its sovereign immunity with respect to suits in the state court for these claims.

That leaves remaining the question of whether (p. 39) the Congress by special enactment has abrogated the State's immunity. I'm inclined to think that it has not, that

28 USC 1362 should not be read as an abrogation. However, there are a number of district court cases which seem to say that the 11th amendment is abrogated when actions are brought under 28 USC Section 1362. Therefore, even though I am inclined to dismiss for lack of jurisdiction because of the State's sovereign immunity under the 11th Amendment, I am going to proceed, as an alternative, to the 28 USC Section 1362 issues.

28 USC Section 1362 provides that the district courts have original jurisdiction of civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter and controversy arises under the constitution, laws or treaties of the United States.

The question of whether the Plaintiffs in this case, or I should say, whether the Native Village of Noatak and Circle Village during Fiscal Year 1985, are an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior. That question is a close one.

The Question of whether the matter in controversy arises under the constitution, laws or treaties of the United States, strikes me as a less complex question. There is no jurisdiction in the federal courts to hear a (p. 40) case merely because an Indian or an Indian tribe is a party to it. That is an axiom recited in Wright and Miller, Section 3579.

28 USC Section 1362 appears to have been passed in response to a 9th Cir. decision in 1964. That decision said that a certain suit by Indian tribes could not be brought because there was no showing that more than \$10,000

was in controversy, which the federal question jurisdiction then required.

The purpose of the statute, according to the analysis in Wright and Miller, is to prevent Indian tribes or bands recognized by the Secretary to bring suits which raise a federal question, even if the amount in controversy is less than \$10,000.

That has been somewhat broadened by decisions interpreting Section 1362, but the decisions seem to relate only to Indian land issues, because Indian title is a matter of federal law, and therefore, the right to possession arises under federal law.

Under *Ghila River Indian Community vs. Heningson*, it is not correct to read Section 1362 to provide jurisdiction for a tribe to bring any action where the United States could have brought an action on behalf of the tribe under 25 USC Section 175.

The arising under language of Section 1362 is (p. 41) identical to that in Section 1331, and therefore, except for possessory rights of tribes to tribal lands, generally refers to federal questions in the traditional sense. That leads us to the question, and again, I have not decided that the tribes in this case are Indian tribes or bands with governing bodies duly recognized by the Secretary of the Interior. That's a difficult question on which the Plaintiffs might not prevail under *Price vs. State of Hawaii*, 764 F. 2d 623, but I'm just not reaching it.

What persuades me in this case is that there is no federal question. The State passed the statute, the gravamen of Plaintiffs' complaint is that the Commissioner of

the Department of Community and Regional Affairs of the State did not obey the state law.

That is about as clear a state question as there could be. I'm going through the complaint to see whether it stated a federal question. Obviously, dependent state claims in the 5th through the 8th causes of action do not state federal questions.

The 1st Amendment claim in the 4th cause of action impresses me as frivolous. There is nothing about giving the money to White villages, as well as native villages, for which any facts are stated to show that this would impair or prevent persons in the native villages from speaking or associating with each other, or practicing (p. 43) their religion, and the mere conclusory statement that it wouldn't is not enough to create a federal question where the facts stated show that it would not.

The third cause of action also impresses me as patently without merit, and insubstantial to the extent that it does not involve a federal controversy. The Third cause of action alleges that the actions of the Commissioner, or rather, the Department of Community and Regional Affairs violated a statute, a federal statute granting native tribes and states the unrestricted rights to contract with each other.

However, there's no allegation, there are no facts stated to show any impairment of any right to contract with native tribes. If the Commissioner had said, I won't give the money to any native villages because they don't have the right to contract with the State of Alaska to receive money, then we might have an issue falling within the third cause of action stated by the Plaintiff.

But he didn't say that. He said he would give the money to the state villages, and this was not a contract for services, or something else more obviously a contract; it was simply a unilateral grant. He said he would give the money to the native villages and also to the white villages.

So the facts stated don't show any impairment (p. 43) of any right to contract.

With regard to the second cause of action, the actions of the Department infringed upon tribal powers of self-government. This impresses me as being similar to the 1st Amendment claims in the fourth cause of action. The facts stated don't show how giving the native villages their money, and giving white villages the money too, or for that matter, giving the native villages somewhat less money than the Legislature intended them to have would infringe upon tribal powers of self-government.

It would mean that taking the facts most favorably to the Plaintiff, that some of these village governments might have less money. That would - to read into that an illegal infringement upon tribal rights of self-government, though, would take federal courts into political questions of forcing state governments to appropriate money.

The first cause of action which I backed up to is the hardest, and that's why I worked up to it backwards. The first cause of action says that the actions of the Commissioner in expanding the class to include entities other than the native village governments were taken under color of state law, and based solely on racial ancestry and therefore, violated due process, equal protection, Indian

commerce and supremacy clauses of the United States (p. 44) Constitution, and federal common law, authorizing discreet treatment of Indian tribes.

It appears to me that this claim as well is patently without merit. The Plaintiffs concede, as I think they must, that if the Legislature had passed the law at the beginning to say what it ultimately said after it was revised, the Department shall pay to each unincorporated community an entitlement of \$25,000 each fiscal year to be used for public purpose, that there would be no violation of law here.

Commissioner Notti interpreted the old law to mean what the new law says because of what he perceived to be partly or entirely state constitutional objections to the old law. However, if the new law would not violate federal law in these respects, then neither would the administrative interpretation of the old law to mean what the new law says.

Furthermore, I cannot see how treating people alike, regardless of what race they have, discriminates against people on account of their race. I understand the argument that the Plaintiffs made, it just does not strike me as consistent with what the words say in the 14th Amendment to the United States Constitution.

I make no determination of whether Commissioner Notti was correct or incorrect in reading Alaska law as he (p. 45) did, because whether he was right or wrong, there's no federal question.

The matter in controversy does not arise under the constitutional laws or treaties of the United States. It arises solely under Alaska law.

As to whether the Circle Village Claim for 1985 is res judicata, I do not reach that question because I find a lack of jurisdiction on the alternative grounds of 28 USC Section 1362 and the 11th Amendment. Accordingly, Plaintiffs' claims are dismissed. The dismissal is with prejudice in federal court, but it is without prejudice, the reassertion of the claim in the state court.

The injunction which has been issued in this case is dissolved. The bond is not exonerated at this time. I'll give counsel an opportunity to make any showing of charges which should be made against the bond. Is 30 days adequate for that?

MR. MERTZ: Yes, Your Honor.

THE COURT: Defendants may file within 30 days whatever materials are necessary to make any claim against the bond if it's in the -

MR. ASCHENBRENNER: Your Honor?

THE COURT: Mr. Aschenbrenner?

MR. ASCHENBRENNER: Your Honor, would it be possible to have the injunction continued for 10 days during (p. 46) which time we can file our notice of appeal? Otherwise, the funds are apt to be disbursed, and then they would be gone.

THE COURT: I can't enjoin something if I don't have jurisdiction over the case. I understand what you're saying, but I don't think it's logical for me to do that, if I

don't have jurisdiction, which I don't think I do, I don't think this court has jurisdiction, then it can't be ordering people to do or not do things.

MR. ASCHENBRENNER: Thank you, Your Honor.

THE COURT: Is there anything further?

MR. ASCHENBRENNER: No, Your Honor.

MR. MERTZ: No, Your Honor.

THE COURT: Thank you, counsel.

(Whereupon the hearing in the above-entitled matter was adjourned at 2:52 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Patricia A. Petrilla November 25, 1987
Patricia A. Petrilla, Transcriber

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | | |
|---------------------------|---|---------------|
| NATIVE VILLAGE OF NOATAK; |) | |
| CIRCLE VILLAGE, |) | |
| |) | |
| Plaintiffs-Appellants, |) | |
| |) | |
| and |) | |
| |) | |
| NATIVE VILLAGE OF |) | |
| AKIACHAK, |) | |
| |) | Nos. |
| |) | 87-4310; |
| Plaintiff, |) | 87-4374 |
| |) | |
| v. |) | D.C. No. |
| |) | CV-85-503-AJK |
| DAVID HOFFMAN, as |) | |
| Commissioner, Department |) | |
| of Community and Regional |) | |
| Affairs, State of Alaska, |) | |
| |) | |
| Defendant-Appellee. |) | |

APPEAL from the United States District Court for the Alaska District of Anchorage.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Alaska District of Anchorage and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED and REMANDED.

B-2

cy: L. Aschenbrenner
M. Walleri
H. Brown (AAG)
Judge Kleinfeld

Filed and entered February 12, 1990

B-3

**NATIVE VILLAGE OF NOATAK; Circle Village,
Plaintiffs-Appellants,**

and

Native Village of Akiachak, Plaintiff,

v.

**David HOFFMAN, as Commissioner, Depart-
ment of Community and Regional Affairs,
State of Alaska, Defendant-Appellee,**

Nos. 87-4310, 87-4374.

**United States Court of Appeals,
Ninth Circuit.**

Argued and Submitted Aug. 3, 1988.

Decided Feb. 12, 1990.

Native Villages brought federal and state claims against Alaskan official, seeking order directing that official pay over revenue sharing monies appropriated by legislature for Villages and prohibiting him from diluting Villages' share of monies. The United States District Court for the District of Alaska, Andrew Kleinfeld, J., dismissed action for lack of jurisdiction, and Native Villages appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) Village with governing body approved by Secretary and Village listed as Native Village in Alaska Native Claims Settlement Act qualified for benefits of federal statute providing federal district courts with original jurisdiction of civil actions brought by recognized Indian tribes when matter arose under federal law; (2) states had consented to federal jurisdiction of Indian affairs through federal constitutional clause providing Congress with power to regulate commerce with Indian tribes, and Eleventh Amendment did not

revoke consent of states to federal jurisdiction over Indian affairs, so states were not immune from suit by Indian tribes; and (3) federal district court had jurisdiction over claim that state had racially discriminated by diluting bonus granted to Native Villages as entities on racial grounds and over allegation that official violated federal laws and policies intended to further tribal self-government.

Reversed and remanded.

Kozinski, Circuit Judge, filed dissenting opinion.

Opinion, 872 F.2d 1384, withdrawn.

Lawrence A. Aschenbrenner and Robert T. Anderson, Anchorage, Alaska, for plaintiffs-appellants.

Gary I. Amendola and Douglas K. Mertz, Asst. Attys. Gen., Juneau, Alaska, for defendant-appellee Hoffman.

Appeal from the United States District Court for the District of Alaska.

Before KOZINSKI, NOONAN and THOMPSON, Circuit Judges.

ORDER

The opinion filed March 30, 1989 is hereby withdrawn. The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. General Order 5.4(b) now applies.

OPINION

NOONAN, Circuit Judge:

The Native Village of Noatak, the Native Village of Akiachak and Circle Village brought this action against the Commissioner of the Department of Community and Regional Affairs of the State of Alaska (the Commissioner). The district court dismissed the case for want of jurisdiction. The Native Village of Noatak and Circle Village (the Native Villages) appeal to this court. We reverse and remand.

The Parties

Noatak is a government with a local governing board organized under the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.* Circle Village has a traditional Council form of government. The defendant Commissioner is the principal officer of a department of the state of Alaska, responsible for administering the payment of revenue-sharing funds.

The Causes of Action

The Native Villages allege that they have been authorized to receive their pro rata share of the funds appropriated by the Alaska Legislature, up to \$25,000, in accordance with Alaska Stat. §§ 29.89.010 and 29.89.050, which provided, "the state shall pay \$25,000 to a Native Village government for a village which is not incorporated as a city under this title." Alaska Stat. § 29.89.050 (1980). The plaintiffs allege that the Commissioner deliberately expanded the class of eligible recipients to include

entities other than the Native Villages solely because of the racial ancestry of the individual members of the villages, in violation of the federal Constitution, of 42 U.S.C. § 1983 and of federal common law authorizing discrete treatment of Indian tribes, with the result that their share was diluted.

As a second cause of action the Native Villages assert that in so diluting the funds available, the Commissioner violated federal laws and policy intended to further tribal self-government, including the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*; the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-41; the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*; the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*; the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601-1680; and the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.*

As a third cause of action the Native Villages allege that the Commissioner's conduct also violated 25 U.S.C. § 476, which, they contend, grants native tribes the unrestricted right to contract with states. As a fourth cause of action the Native Villages claim that the Commissioner's conduct violated the First Amendment by destroying native culture and therefore their most basic form of expression, religion and association. Four additional claims are put forward as pendent state claims. The plaintiffs seek damages, an order directing the Commissioner to pay over the monies appropriated by the Legislature and an injunction prohibiting further administration of the statute in a way that would preclude the plaintiffs from receiving a full share.

Proceedings

The district court held that the court did not have jurisdiction because the plaintiffs' suit was barred by the eleventh amendment or because, in the alternative, the case did not arise under the Constitution, laws or treaties of the United States. This appeal followed.

Analysis

1. Jurisdiction

28 U.S.C. § 1362 provides that the district courts "shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Are the Native Villages "tribes" which have been "duly recognized by the Secretary of the Interior?" The Native Villages represent bodies of Indians of the same race united in a community under a single government in a particular territory - Noatak at Bering Strait, Circle Village at Upper Yukon-Porcupine. They therefore meet the basic criteria to constitute Tribes. *Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 359, 45 L.Ed. 521 (1901).

No statute expressly outlines how a tribe may become duly recognized for purposes of section 1362 jurisdiction. In *Price v. Hawaii*, 764 F.2d 623, 626 (9th Cir.1985), *cert. denied*, 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986), this court left open the question whether formal

organization or incorporation of a tribe followed by approval of the organization or incorporation by the Secretary of the Interior constituted being "duly recognized" for the purpose of the statute. We see no reason to suppose that the Secretary of the Interior needs to issue a special document conferring a right to sue under the statute. Noatak Village has a governing body approved by the Secretary. 25 U.S.C. § 476. It is therefore a tribe with a duly recognized governing body and qualifies for the benefits of section 1362. *Cf. Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir.1988) (uncertainty existed concerning structure of Alaska Indian villages involved; tribal status not resolved solely by reference to organization of tribe under Indian Reorganization Act).

Circle Village, like Noatak, is listed as a Native Village in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(1). The purpose of this Act was to make "a fair and just settlement of all claims by Natives and Native Groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). The Villages acknowledged by the Act were distinguished from ineligible villages "of a modern and urban character," where the majority of the residents were not natives. 43 U.S.C. § 1610(b)(2), (3). The Villages acknowledged by the Act were possessed of aboriginal land claims and became eligible for the benefits provided under the Act. The Act was congressional recognition of the Native Villages.

In addition, in three recently enacted statutes – the Indian Self-Determination Act, 25 U.S.C. § 450b(e); the Indian Financing Act, 25 U.S.C. § 1452(c); and the Indian Child Welfare Act, 25 U.S.C. § 1903(8) – Congress treated the Native Villages as Indian tribes. Arguably, Congress

intended to confer recognition only for the particular purposes of each piece of legislation. *See, e.g., Native Village of Venetie*, 856 F.2d at 1387. But the nature and scope of the federal government's relationship with the Native Villages, as evidenced by these Acts, indicates that the recognition extends to legal claims. "[I]t is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians." *Three Affiliated Tribes v. World Eng'g, P.C.*, 467 U.S. 138, 149, 104 S.Ct. 2267, 2275, 81 L.Ed.2d 113 (1984).

It is true that section 1362 speaks of recognition by the Secretary of the Interior, not Congress, but the Secretary is only using power delegated by Congress. If Congress has recognized the tribe, a fortiori the tribe is entitled to recognition and is in fact recognized by the Secretary of the Interior. Consequently, Circle Village, as well as Noatak, qualifies under section 1362.

2. The Sovereign Immunity of the State of Alaska

The Commissioner contends that the Eleventh Amendment was properly applied by the district court to deny jurisdiction. What has been authoritatively resolved as to the jurisdiction of the federal courts of suits against the states is the following:

One state may not be sued by the citizens of another state. U.S. Const. amend. XI.

The citizens of a foreign state may not sue a state. *Id.*

The citizens of the same state may not sue the state. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

A corporation chartered by Congress may not sue a state. *Smith v. Reeves*, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (1900).

A foreign state may not sue the state. *Monaco v. Mississippi*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934).

The immunity of the states from suit in these cases has been addressed by the Supreme Court in terms of the Eleventh Amendment, interpreted well beyond its literal language, as *Hans*, *Smith* and *Monaco* vividly illustrate. The Court, it may be felt, has constructed a jurisprudence in respect to this amendment in which the Court's own gloss, the Court's own readings of the amendment's spirit and purpose are what count. The same court that used the strongest language in stating the doctrine of sovereign immunity in *Hans* had no difficulty in subjecting the states to suit by the United States in *United States v. Texas*, 143 U.S. 621, 642, 12 S.Ct. 488, 492, 36 L.Ed. 285 (1892) (relying upon *United States v. North Carolina*, 136 U.S. 211, 10 S.Ct. 920, 34 L.Ed. 336 (1890), *overruled on other grounds*, *West Virginia v. United States*, 479 U.S. 305, 311 n. 4, 107 S.Ct. 702, 707 n. 4, 93 L.Ed.2d 639 (1987)). And in *South Dakota v. North Carolina*, 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448 (1904), the Court held that a state may sue another state in federal courts.

Chief Justice Hughes in *Monaco*, 292 U.S. at 329, 54 S.Ct. at 750, magisterially explained the reason for these differing results. In the cases where jurisdiction was found to exist, the states, by accepting the Constitution,

consented to such jurisdiction as was "inherent in the constitutional plan." *Id.* The states have agreed to federal tribunals "essential to the peace of the Union." *Id.* at 328, 54 S.Ct. at 750.

Thus it is apparent that the literal language of the Eleventh Amendment does not control. Rather, the "principles of federalism" that inform the amendment, *Dellmuth v. Muth*, ___ U.S. ___, 109 S.Ct. 2397, 2400, 105 L.Ed.2d 181 (1989) are what have governed constitutional meaning here. The question consequently is, "Do the principles of federalism implicit in the Eleventh Amendment indicate that the states possess immunity from suit by an Indian tribe?"

Two opinions of the Supreme Court have suggested that there is immunity. In *United States v. Minnesota*, 270 U.S. 181, 46 S.Ct. 298, 70 L.Ed. 539 (1926), the plaintiff was the United States. The court assumed that the affected Indian tribe could not sue Minnesota because of what the Court termed "the general immunity" of the state from suit. *Id.* at 195, 46 S.Ct. at 301. The observation was the purest dictum. Again, in *Arizona v. California*, 460 U.S. 605, 614, 103 S.Ct. 1382, 1388, 75 L.Ed.2d 318 (1983), the Court stated that it was "[a]ssum[ed], *arguendo*," that the intervention by the Indian tribes in the suit would violate the Eleventh Amendment, but held that, since the United States had already presented the claims of the tribes, "the States involved no longer may assert that immunity with respect to the subject matter." As the Court in neither case directly addressed the question, it remained unresolved.

In support of the Commissioner's position there stands the square holding of the Eighth Circuit, per Webster, J., in *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir.1974). This case held, first, that, although the words of the amendment did not bar suit by an Indian tribe, the Eleventh Amendment should be "liberally construed to achieve its intended purpose," *id.* at 1138, and, so construed, barred the suit; and, second, that 28 U.S.C. § 1362, creating federal jurisdiction of suits by Indian tribes, did not strip the states of their immunity. *Id.* at 1140.

As to the second proposition on the effect of 28 U.S.C. § 1362, there can now be little argument. It has been authoritatively held that to abrogate sovereign immunity of a state, Congress must express its intention to do so "in unmistakably clear language." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478, 107 S.Ct. 2941, 2948, 97 L.Ed.2d 389 (1987). It has recently been reemphasized that congressional intent to abrogate sovereign immunity "must be both unequivocal and textual." *Dellmuth*, 109 S.Ct. at 2401. The statute conferring jurisdiction of suits brought by tribes does not unmistakably, unequivocally and textually abrogate the state's immunity, if immunity there is.

As to the first proposition that the Eleventh Amendment, liberally interpreted, has bestowed immunity, the question is more complicated. The proper interpretation of the Eleventh Amendment is not achieved by reading it as expansively as possible. A proper reading is a reading consistent with the principles of federalism that inform

the amendment. These principles recognize that a consent by the states to suit may be "inherent in the constitutional plan" and that federal tribunals may be essential to the peace of the United States. It is in consideration of this truth that we respectfully part company with the conclusion of the Eighth Circuit in *Standing Rock*.

Article I, Section 8, Clause 3 of the Constitution provides Congress with power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As to the tribes, this clause constitutes consent by the states to federal jurisdiction, for three reasons:

First. The tribes constituted a presence within the nascent United States. They were not foreign states that could be ignored or kept at arm's length. Every state in the new union was inhabited by tribes. 4 *Handbook of North American Indians* 7, 213 (W. Sturtevant ed. 1988). The new union could not exist without the allocation of governmental power in relation to them.

Second. Not only were they unlike any foreign nation in being in immediate proximity to the states, the tribes also stood in a relation that could break into armed hostility against the people of the United States. When the Constitution came into being, "[t]he first consideration" of the government as to Indian affairs was "peace." F. Prucha, *American Indian Policy in the Formative Years* 44 (1962). "The country, precariously perched among the sovereign nations of the world, could not stand the expense and strain of a long drawn-out Indian war." *Id.* On August 22, 1789, for example, President

Washington and Secretary of War Knox met with the Senate and set before it the necessity "[t]o conciliate the powerful tribes of Indians in the southern District, amounting probably to fourteen thousand fighting Men. . . . The fate of the southern states . . . may principally depend on the present measures of the Union towards the southern Indians." 2 *Senate Executive Journal and Related Documents* 31 (L. De Pauw ed. 1974).

The power of Congress to make war or peace and the power of the United States to make treaties was exercised in order to secure the states. In practice contemporaneous with the generation that adopted the Eleventh Amendment, the United States made treaties with "the Creek Nation," 7 Stat. 56 (1797), "the Cherokee Nation," 7 Stat. 62 (1798), and "the Choctaw Nation," 7 Stat. 66 (1802). Treaties with the Creeks in 1790, 7 Stat. 35, 37, and with the Cherokees in 1792, 7 Stat. 39, 40, treated the Indian country involved as a country which citizens of the United States could enter only if issued a passport by the United States. The United States entered into a mutual assistance pact with the Wyandots and other tribes by Article II of which the tribes agreed "to give their aid to the United States in prosecuting the war against Great Britain." 7 Stat. 118 (1814). The war power and the treaty power of the federal government have been decisively interpreted as both expanding and confirming the jurisdiction surrendered to the United States by the Indian commerce clause. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832), *modified on other grounds*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973); see Newton, *Federal Power Over*

Indians: Its Sources, Scope, and Limitations, 132 U.Pa.L.Rev. 195, 202 (1984).

Third. The Power granted to the federal government over Indian affairs displaced the powers regularly exercised by the states within their borders. For example, the states have been unable to exercise criminal jurisdiction within Indian territory. *Worcester*, 31 U.S. (6 Pet.) 515. "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985).

To put the matter in another way, Indian tribes are more like the United States and the individual states of the United States than they are like individual citizens or like foreign states. Indian tribes have been explicitly held not to be foreign states. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18, 8 L.Ed.25 (1831). Indian tribes are not like individual citizens because of their possession of many of the attributes of sovereignty. The view taken of Indian sovereignty by Chief Justice Marshall was reaffirmed by a unanimous Court holding "[t]he Creek or Muskogee Nation or tribe of Indians" free from liability for failure to keep the peace. *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919). The tribe, Justice Brandeis wrote for the Court, "exercised within a defined territory the powers of a sovereign people." *Id.* at 355, 39 S.Ct. at 109. It had been recognized by the United States as "a distinct political community." *Id.* at 357, 39 S.Ct. at 110. To invoke even more recent authority it has been held that the Indian Civil Rights Act does not authorize suit

against a tribe because the Act does not explicitly override the tribe's sovereignty, and tribes must be acknowledged as "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978).

Indian tribes, although not states, are like states in their presence within the United States as units of government, to be dealt with peacefully. Their presence as governmental units was as much a reality as the presence of the sister states at the time the Union was formed. Even more importantly, the Indian tribes are like the United States because it has been for their benefit that the United States has frequently sued the states. It is in a modern evolution of this relation between them and the United States that they now act for themselves.

Until 1966 the subjection of the states to the United States in Indian affairs was carried out by a statutory scheme which permitted the United States to vindicate the rights of a tribe. Speaking specifically of the relation of the United States to the Cherokees but using language applicable to the relationship between the United States and any Indian tribe, Justice Hughes wrote that as long as the United States is the guardian of the Indians, "the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gain-said." *Heckman v. United States*, 224 U.S. 413, 437, 32 S.Ct. 424, 431, 56 L.Ed. 820 (1912). Addressing the position of the United States as the guardian of non-competent Osage Indians, Chief Justice White upheld the right of the United States to sue "to prevent the systematic violation of the state law committed for the purpose of destroying the rights created by the act of

Congress." *United States v. Board of County Comm'rs*, 251 U.S. 128, 133, 40 S.Ct. 100, 101, 64 L.Ed. 184 (1919).

The general proposition is drawn from these cases "that the United States, by virtue of its special relationship with the Indians, has standing to effectuate federal policies by protecting and enforcing Indian rights arising out of that relationship." F. Cohen, *Handbook of Federal Indian Law* 308 (1982). The federal oversight of Indian affairs is an "exclusive and compelling interest." See *Housing Auth. v. Washington*, 629 F.2d 1307, 1313 (9th Cir.1980) (per Anderson, J.). Since 1966, modern recognition of the ability of a tribe to act for itself has resulted in the enactment of 28 U.S.C. § 1362. In this new form the United States has exercised the authority ceded to it by the states in Article I, Section 8, Clause 3.

That the jurisdiction conceded by the states to the United States was originally exercised by the Congress and the Executive rather than by the federal courts is no refutation of the concession made by the states. In the course of time the United States did exercise its jurisdiction through the federal courts as it acted as the guardian of Indian rights. The modern view is that to the maximum extent possible the trust relation should recognize the autonomy of the tribes. See *The Supreme Court, 1984 Term - Leading Cases*, 99 Harv.L. Rev. 120, 262 n. 70 (1985). That view began to predominate in the 1960s. 2 F. Prucha, *The Great Father: The United States Government and the American Indians* 1088 (1984) [hereinafter F. Prucha, *The Great Father*]. As Robert L. Bennett, the Oneida Indian who became Commissioner of Indian Affairs, put it in a report dated July 11, 1966, "Paternalism creates attitudes of dependency which restrains the social and economic

advancement of Indian people. . . . Indian leadership must be brought aboard to the fullest extent possible." Report from Robert L. Bennett to Henry M. Jackson (July 11, 1966), *quoted in Prucha, The Great Father*, at 1097. The statute enacted in 1966 is fairly read as the embodiment of the new policy, giving the tribes a right to sue that formerly only the United States exercised.

Section 1362 permits Indian tribes access to federal courts for cases in which the United States Attorney has declined to bring an action. It enables Indian tribes "to seek redress using their own resources and attorneys," S.Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966), and "provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys." H.R.Rep. No. 2040, 89th Cong., 2d Sess. 3, *reprinted in 1966 U.S.Code Cong. & Admin. News* 3145, 3147.

It may be asked whether a statute explicitly eliminating immunity is needed to authorize the tribes to sue the states. *See Welch*, 483 U.S. at 478, 107 S.Ct. at 2948. The questions assume that the states possess an immunity that Congress must override. But as *United States v. Texas*, 143 U.S. 621, 12 S.Ct. 488, and *South Dakota v. North Carolina*, 192 U.S. 286, 24 S.Ct. 269, show, if the consent of the state was inherent in the plan of the Constitution, no statute is necessary. The consent has already been given, and immunity to be overcome by Congress does not exist. If the suit of the tribes against Alaska depended solely on abrogation of the state's sovereign immunity, the tribe would encounter the teaching that congressional abrogation of state immunity must be by an explicit statute.

Dellmuth, 109 S.Ct. at 2400. But the reason for that requirement is that abrogation of state sovereignty upsets the fundamental balance between the states and the United States. *Id.* Here the balance was struck in 1789.

It may also be asked if the above line of reasoning is not a restatement of the reasoning of Chief Justice Marshall that every surrender of a portion of sovereignty by a state carried with it an admission of liability to suit in the area of sovereignty surrendered. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380, 5 L.Ed.2d 257 (1821). Such a broad construction of concessions made by the states was repudiated in *Welch*, 483 U.S. at 482 n. 11, 107 S.Ct. at 2950 n. 11. The answer is that Indian affairs are sui generis and that in this unique area concerning relations with non-foreign governmental units, the surrender of state sovereignty carried with it a surrender of immunity from suit.

To recapitulate, there is no need for an explicit overriding of state immunity if the state in consenting to the Constitution has consented to being sued. The state did give consent to federal jurisdiction of Indian affairs. The Eleventh Amendment has not revoked the consent of the states, because neither in terms nor purpose does the amendment apply to Indian tribes. No other general immunity protects the state from suit by the tribes.

Finally, the question may be raised whether the plaintiffs in this case – Alaskan Indian villages – are entitled to the same treatment as the Indian tribes who were present on this continent when the Constitution was adopted. The leading case is *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918). In that

case the United States had acted to protect the fishing rights of the Metlakahtla, a band of about 800 Indians born in British Columbia who migrated to the Annette Islands, a small clump of isles in Southeastern Alaska and there founded a village. In upholding the protective action of the United States, the Court assimilated these foreign-born Alaska Indians to the Indians of the mainland by citing *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912) and its teaching that laws intended for the Choctaws and Chickasaws were to be liberally interpreted in their favor. Insofar as the present case is concerned, no distinction exists between Alaska Indians and those of the other states.

We conclude the plaintiffs are not barred by immunity of the state of Alaska.

3. *The Federal Causes of Action*

The state maintains that the plaintiffs have not alleged federal causes of action. Obviously there was no duty on the part of Alaska to vote a bonus of \$25,000 to each Native Village. Once having voted the bonus, however, the state could not take it away or dilute it on grounds violative of the fourteenth amendment. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). The plaintiffs allege that such a racially based dilution is what has occurred.

The state's answer is, "How can this be? We were giving a bonus to Native Villages whose membership was formed on a racial basis. We got away from the racial basis by making a nonracial criterion the ground for the distribution." The plaintiffs' answer is that the original

scheme of the bonus was based on their identity as political entities. To wipe out their political status on the ground that that status had an ethnic origin is itself a violation of the constitutional command not to discriminate on the basis of race. Paradoxical as it is, the allegation that the move from a tribal basis to a non-tribal basis for the bonus was racially discriminatory is an intelligible claim. Any governmental action based on the racial character of those affected is presumptively invalid. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 485, 102 S.Ct. 3187, 3202, 73 L.Ed.2d 896 (1982) (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979)). Alleging that such discrimination has happened here, the Native Villages have presented a claim which is neither plainly meritless under the Constitution nor foreclosed by prior cases. Cf. *Hagans v. Lavine*, 415 U.S. 528, 543, 94 S.Ct. 1372, 1382, 39 L.Ed.2d 577 (1974). Whether these allegations state a claim upon which relief can be granted is beside the point at this stage of the case. *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946). The scope of our present inquiry is limited to a determination of whether the district court had jurisdiction. We hold that it did.

The Native Villages also properly invoked federal subject matter jurisdiction by their allegation that the Commissioner violated federal laws and policies intended to further tribal self-government. If, as they contend, the Commissioner acted because he believed that the Native Villages could not receive special benefits from the state, the Commissioner did act in an area where the action may be found to have been preempted by federal law. *White Mt. Apache Tribe v. Bracker*, 448 U.S. 136, 100

S.Ct. 2578, 65 L.Ed.2d 665 (1980). Similar conclusions follow as to the third and fourth causes of action where again it may be found that the action of the Commissioner was such as to deny the political reality of the Native Villages because of the Commissioner's view of their racial composition. The pendent claims are cognizable if the four federal claims confer jurisdiction. Accordingly, the decision of the district court is REVERSED and the case REMANDED for further proceedings.

KOZINSKI, Circuit Judge, dissenting:

I am unable to join my colleagues in exploring the boundaries of the eleventh amendment because I do not agree that the district court had subject matter jurisdiction. Subject matter jurisdiction and sovereign immunity are both threshold inquiries, but the former presents a far easier question and I would therefore dispose of the case on those grounds. While I don't necessarily disagree with the majority's analysis of the eleventh amendment, I cannot help being concerned that it unnecessarily decides not one, but two difficult constitutional questions not properly before the court: whether Indian tribes are exempt from the eleventh amendment's restrictions on suits against states in federal court and, if so, whether the native villages are Indian tribes for purposes of that amendment.¹ In so doing, the majority opinion creates a

¹ The majority devotes substantial attention to whether the native villages are "Indian tribe[s] or band[s] with a governing body duly recognized by the Secretary of the Interior" for purposes of obtaining jurisdiction under 28 U.S.C. § 1362. Majority op. at 1160. This may be a fundamentally different

(Continued on following page)

conflict with one of our sister circuits, see *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140-41 (8th Cir.1974) (eleventh amendment applies to Indian tribes), and may in fact be contrary to two holdings of the Supreme Court, see *Arizona v. California*, 460 U.S. 605, 614, 103 S.Ct. 1382, 1388, 75 L.Ed.2d 318 (1983) (assuming that the eleventh amendment applies to Indian tribes); *United States v. Minnesota*, 270 U.S. 181, 195, 46 S.Ct. 298, 301, 70 L.Ed. 539 (1926) (same). In light of these real and potential conflicts, I would await a case where our jurisdiction is more secure before expounding on these difficult issues of eleventh amendment jurisprudence. I must therefore respectfully dissent.

To state a federal claim, it is not enough to invoke a constitutional provision or to come up with a catalogue of federal statutes allegedly implicated. Rather, as the Supreme Court has repeatedly admonished, it is necessary to state a claim that is substantial: "[T]he federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.' 'wholly insubstantial,' 'obviously frivolous,' 'plainly unsubstantial,' or 'no longer open to discussion.'" *Hagans v. Lavine*,

(Continued from previous page)

question than whether the native villages are tribes under the eleventh amendment. If, as the majority suggests, the eleventh amendment doesn't apply to Indian tribes because "Indian tribes are more like the United States and the individual states of the United States than they are like individual citizens or like foreign states," *id.* at 1163, shouldn't the majority determine whether the native villages fit this description? Or, is any organized group of Indians exempt from the eleventh amendment's restrictions?

415 U.S. 528, 536-37, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577 (1974) (citations omitted). We do not have jurisdiction over a claim, no matter how federal it purports to be, that is "patently without merit, or so insubstantial, improbable, or foreclosed by Supreme Court precedent as not to involve a federal controversy." *City of Las Vegas v. Clark County*, 755 F.2d 697, 701 (9th Cir.1985) (quoting *Demarest v. United States*, 718 F.2d 964, 966 (9th Cir.1983), cert. denied, 466 U.S. 950, 104 S.Ct. 2150, 80 L.Ed.2d 536 (1984)).

While this doctrine has been criticized, see, e.g., *Hagans*, 415 U.S. at 538, 94 S.Ct. at 1379; *Rosado v. Wyman*, 397 U.S. 397, 404, 90 S.Ct. 1207, 1213, 25 L.Ed.2d 442 (1970); *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), it serves an important practical purpose: It prevents plaintiffs from using a federal court's pendent jurisdiction to propel state claims into federal court by attaching them to meritless federal claims. See *Hagans*, 415 U.S. at 555, 94 S.Ct. at 1388 (Rehnquist, J., dissenting); *Silver v. Louisville & Nashville R.R.*, 213 U.S. 175, 191-92, 29 S.Ct. 451, 454-55, 53 L.Ed. 753 (1909). And that is precisely what's happening here.

In 1980, the Alaska Legislature enacted a revenue sharing program according to which all unincorporated communities with a Native village government would receive \$25,000 a year. The following year, the state Attorney General advised the Department of Community and Regional Affairs, the state agency responsible for implementing the program, that the program violated the equal protection and public purpose clauses of the Alaska Constitution, art. I, § 1 and art. IX, § 6. In order to comply with the state constitution, the Department made the funds available to all unincorporated communities,

whether or not they had Native village governments. The appellants, whose share of the pie may have been diminished when the class of recipients was broadened, disagreed with the Attorney General's analysis and filed this suit.

The villages' purported federal claim is that the state, once having decided to favor Indians over other citizens, is not precluded from treating them the same. As a matter of federal equal protection, this claim is frivolous: I am aware of no constitutional provision that requires a state to treat Indians and non-Indians differently. While the equal protection clause may permit states to favor Indians, it certainly does not compel it. The villages' equal protection claim is not aided in any way by the fact that the state Attorney General's equality requirement is based on the Alaska Constitution; the federal equal protection clause does not preclude the states from adopting constitutional provisions that guarantee equal treatment for their citizens.

Equally frivolous are the villages' claims based on various federal statutes intended to further tribal self-government. The Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1982 & Supp. IV 1986), comprises a hodgepodge of statutes relating to land transfer and tribal organization. The Indian Civil Rights Act of 1968, Pub.L. 90-284, 82 Stat. 77-80 (codified as amended in scattered sections of title 25), extends a number of federal constitutional rights to members of Indian tribes and authorizes state courts to assume jurisdiction over certain causes of action arising on Indian reservations. The Indian Financing Act of 1974, Pub.L. 93-262, 88 Stat. 77 (codified as amended in scattered sections of title 25), provides credit

to members of Indian tribes. The Indian Self-Determination and Education Assistance Act, Pub.L. 93-683, 88 Stat. 2203 (codified as amended in scattered sections of titles 5, 25, 42 & 50), provides federal assistance for, among other things, tribal governments and school districts educating tribe members. The Indian Health Care Improvement Act, Pub.L. 94-437, 90 Stat. 1400 (codified as amended in scattered sections of title 25), as its name implies, relates to health care. The Indian Child Welfare Act of 1978, Pub.L. 95-908, 92 Stat. 3069 (codified as amended in scattered sections of title 25), includes provisions covering child custody proceedings and federal assistance for various family-related programs. Many of these statutes provide money to Indian tribes, but that is the full extent of their relevance to this lawsuit. By no stretch of the imagination do they preempt state constitutional provisions calling for equal treatment of Indians and non-Indians.

The villages' third and fourth federal causes of action are similarly insubstantial. Section 476 of title 25 permits Indian tribes to organize, adopt a constitution, and negotiate with the federal, state and local governments. It is difficult to ascertain exactly how this statute could be violated by diluting the villages' share of state revenues. The villages' contention that the dilution extinguished their powers of self-government and destroyed their Native culture, in violation of the first amendment, is hyperbole.

It is a "fundamental and long-standing principle of judicial restraint . . . that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lying v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S.Ct. 1319, 1323, 99 L.Ed.2d 534 (1988);

see also *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02, 105 S.Ct. 2794, 2800-01, 86 L.Ed.2d 394 (1985); *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157-58, 104 S.Ct. 2267, 2278-79, 81 L.Ed.2d 113 (1984). Although the majority undoubtedly sees it differently, it clearly violates this principle by deciding two difficult questions of eleventh amendment jurisprudence not properly before this court. Even under the most generous construction of the federal Constitution and title 25 of the United States Code, the four federal claims fit any of the *Hagans* formulations of insubstantiality: They are "obviously frivolous;" they are "plainly unsubstantial;" they are "absolutely devoid of merit." They serve a single purpose: to transport state claims into federal court. I would accordingly affirm the district court's dismissal of lack of substantial federal question and save these difficult eleventh amendment issues for another day. Judging from the state's relationship with the villages, that day may be coming soon enough.

APPENDIX C

PRINCIPAL CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, Section 8, clause 3 of the United States Constitution states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

Article III, Section 2 of the United States Constitution states in relevant part:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; - to all cases affecting ambassadors, other public ministers and consuls; - to all cases of admiralty and maritime jurisdiction; - to controversies to which the United States shall be a party; - to controversies between two or more states; - between a state and citizens of another state; - between citizens of different states; - between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

The Eleventh Amendment to the United States Constitution states:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602(c)) states:

"Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives.

Section 1 of the Alaska amendments to the Indian Reorganization Act (25 U.S.C. § 473a) states:

Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

28 U.S.C. § 1362 states:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1989

U.S.
 FILED
 16 - 1990
 JOSEPH F. SPANIEL, JR.
 CLERK

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF
 COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
 CIRCLE VILLAGE,
Respondents.

On Petition For A Writ Of Certiorari
 To The United States Court Of Appeals
 For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION
 FOR WRIT OF CERTIORARI

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July 16, 1990

**COUNTERSTATEMENT OF THE
QUESTIONS PRESENTED**

1. Does the unique sovereign status of Indian tribes under the constitution and the federal government's plenary authority over Indian affairs authorize federal court damage suits by tribes against states to vindicate federal rights?

2. Are Native Villages organized under the Indian Reorganization Act and villages whose aboriginal rights were extinguished in exchange for land and money under the Alaska Native Claims Settlement Act recognized tribes for purposes of bringing suit under 28 U.S.C. § 1362?

3. Is there a federal question presented when a state refuses to acknowledge the political status of federally recognized tribes and denies them state benefits by reason of their race?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 89-1782

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF
COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

COUNTERSTATEMENT OF THE CASE

Respondent Native Village of Noatak, a federally
recognized Alaska Native tribe,¹ respectfully requests

¹ The Native Village of Noatak is a remote Inupiat Eskimo
village located in Northwest Alaska above the Arctic Circle,
along the Noatak River inland from Kotzebue Sound and the
Chukchi Sea.

the Court to refuse the writ of certiorari sought by petitioner Commissioner of the Alaska Department of Community and Regional Affairs.²

This controversy arises out of the refusal, until recently, of Alaska's executive branch to deal with Alaska Native villages as "Indian tribes" with powers of local self-government rather than as racially-defined groups. In 1980 the Alaska Legislature, in recognition of the *tribal* status of Native villages, enacted a revenue-sharing statute³ providing for annual payments of \$25,000 to each "Native village government" located in a community which did not have a State-chartered municipal corporation. Alaska Stat. §§ 29.89.010 (1984) and 29.89.050 (1984). The term "Native village government" was defined to include governments reorganized under the 1934 Indian Reorganization Act (25 U.S.C. § 476) ["IRA"],⁴ tradi-

² The district court's initial decision granting respondents' motion for preliminary injunction is unreported and is reproduced in the appendix to this brief, App. A-1. The district court's subsequent judgment and bench ruling dismissing respondents' complaint on jurisdictional grounds are reproduced as Appendix A to the petition for certiorari, Pet. App. A-1 - A-14. The initial opinion of the Ninth Circuit in this case is reported at 872 F.2d 1384 (March 30, 1989). The order withdrawing this opinion, and opinion on rehearing, are reported at 896 F.2d 1157 (February 12, 1990), and reproduced at Pet. App. B at B-1 - B-27. The Commissioner's petition for rehearing and suggestion for rehearing *en banc* were denied, with no judge of the Ninth Circuit voting for *en banc* reconsideration. Pet. App. B 1-4.

³ The statute is set forth in the district court's preliminary injunction filed March 3, 1986, which is reproduced in the appendix hereto. See App. A-1 at A-2.

⁴ The Native Village of Noatak has a government reorganized under the IRA; Circle Village has a traditional council form of

tional village councils, "paramount chief[s]," or other governing bodies of the tribal villages with which Congress dealt in the Alaska Native Claims Settlement Act ("ANCSA"). Alaska Stat. § 29.89.050 (1984).⁵

In opinions issued in 1981 (Complaint, Exhibits A and B), the Alaska Attorney General disagreed with the Alaska Legislature, concluding that the revenue-sharing statute was unconstitutional. He found that Alaska Native village governments were not politically defined, but were "racially exclusive group[s]" or "racially exclusive organizations" whose status turns solely "upon the racial ancestry of the communities."⁶ On this basis the Attorney General opined that providing State aid to tribal governments violated the equal protection clauses of the Fourteenth Amendment and article I, section 1 of the Alaska Constitution.⁷ The Attorney General reached this con-

government. Both governments are situated in villages which are not incorporated as State-chartered municipalities. Both villages are named in section 11(b)(1) of ANCSA as beneficiaries of the Native claims settlement act. 43 U.S.C. § 1610.

⁵ ANCSA settled tribal land claims in Alaska by, inter alia, the payment of nearly one billion dollars and the recognition of fee title to over 44 million acres in exchange for the extinguishment of aboriginal title to the rest of Alaska. 43 U.S.C. §§ 1601-1628.

⁶ As District Judge Holland noted in his preliminary injunction, "the State has consistently characterized the 'Native village government' rubric of [the statute] as being a racially tainted term. The Court has substantial doubts that this characterization is appropriate." App. A-1 at A-15.

⁷ The Attorney General also concluded that equal protection principles were violated because villages with tribal governments were so similar to villages without tribal governments as to be constitutionally indistinguishable; and that the program violated

clusion notwithstanding this Court's holding that Indian Tribes are quasi-sovereign entities, not defined by race but by political affiliation. See e.g., *Morton v. Mancari*, 417 U.S. 535, 551-555 (1974); *United States v. Antelope*, 430 U.S. 641, 646 (1977).

The Commissioner of Community and Regional Affairs acted on the Attorney General's advice by administratively expanding the program beyond its statutory scope to provide revenue sharing to all unincorporated communities rather than just those with tribal governments.⁸ As a result Noatak's pro rata share of the fund appropriated by the legislature was diminished. In 1985, the Legislature amended the revenue-sharing statute (effective commencing with the 1987 state fiscal year) to conform to the administrative expansion of the program, thus statutorily providing aid to all unincorporated communities regardless of the presence of a Native village government. Alaska Stat. § 29.60.140 (1986).

Respondents brought this action in September 1985 to challenge the State Executive's policy and practice of treating tribal governments as racial groups rather

the public-purpose and local-government provisions of the Alaska Constitution.

⁸ Petitioner has contended throughout the litigation, as he does here (Pet. at 2-3 n.1), that no village suffered as a result of his decision to administratively expand the program, because the Legislature funded the expanded program as fully as it would have funded the program limited to Native village governments. Respondents allege, however, that their entitlements were diminished by petitioner's action. This factual dispute has not been resolved, and both the district court (Pet. App. A at A-11) and the Ninth Circuit (Pet. App. B at B-6) assumed the correctness of respondents' allegation for the purposes of their decisions.

than political bodies. Respondents sought permanent declaratory and injunctive relief, together with an order requiring petitioner to pay respondents and all similarly affected Native village governments the amounts they would have received but for the administrative expansion of the program.⁹

Respondents moved for a preliminary injunction to preserve sufficient fiscal year 1986 revenue-sharing funds (the last year of funding under the 1980 statute before it was legislatively amended to conform to the opinion of the Attorney General) to make up for the dilution in funding resulting from petitioner's administrative expansion of the program. District Judge Holland granted the preliminary injunction. App. A-

⁹ Although respondents' complaint prayed for a class-wide award of retroactive monetary benefits (approximately 50 villages were in the purported class), respondents' motion for class certification was denied after the State volunteered to treat all similarly situated villages in accordance with the judgment, if any, secured by respondents. *Order Granting Preliminary Injunction*, App. A-1 at 9; Defendant's Memorandum in Support of Motion to Dismiss, App. B-1 at 1; Defendant's Opposition to Motion for Preliminary Injunction, App. C-1 at 1; Defendant's Opposition to Motion for Class Certification, App. D-1 at 1-2; and Defendant's Opposition to Emergency Motion Under Circuit Rule 27-3 in the Ninth Circuit, App. E-1 at 5. In addition, Circle Village's claim is disputed on the grounds that it did not apply for the last year of the program (fiscal year 1986), and a State-court claim by Circle for a prior year was dismissed as moot by the Alaska Supreme Court. *Circle Village Council v. State of Alaska*, No. S-1572, unpublished opinion (Alaska 1987). The maximum Noatak could recover for the shortfalls during 1983-1986 is \$13,140.15. App. B-1 at 1, and App. C-1 at 1. The State is voluntarily holding \$611 as the amount which the state calculates Noatak would be due for fiscal year 1986 should Noatak prevail in this action. See App. E-1 at 5.

1, *infra*. Pursuant to that injunction, petitioner's predecessor withheld \$29,939 from his remaining 1986 revenue-sharing disbursements, an amount apparently reflecting the value of the last half of that year's dilution to all qualified Native village governments.¹⁰

When District Judge Kleinfeld (to whom the case was reassigned) ultimately dismissed the action on alternative jurisdictional grounds,¹¹ both the district court and the Ninth Circuit denied an injunction pending appeal that would have preserved the \$29,939 petitioner was holding pursuant to the 1986 preliminary injunction. Nonetheless, petitioner voluntarily agreed to continue holding \$611 for the benefit of respondent Noatak (respondent Circle Village having not applied to the revenue-sharing program for fiscal year 1986), an amount petitioner determined would be the maximum amount due Noatak should it prevail on the merits.¹²

The posture of this case is dramatically different from when it began. Throughout the litigation in the courts below, Alaska's executive branch staunchly defended the policy the Attorney General and petitioner's predecessors adopted in 1981, namely, that the Native villages which participated in the 1971 congressional settlement of aboriginal Native land claims are not tribes and must be viewed instead as

¹⁰ App. E-1 at 5.

¹¹ Judge Kleinfeld's alternative grounds were that either the whole case (including respondents' prayer for purely prospective declaratory and injunctive relief) was barred by the Eleventh Amendment, or that respondents' federal claims were insubstantial.

¹² App. E-1 at 5.

"racial groups." But in its petition here, the State reverses position and charts a new course:

The State of Alaska does not deny the existence of tribes in Alaska. In fact, the State of Alaska believes that a majority of the Native villages listed in § 11(b)(1) of the Alaska Native Claims Settlement Act [43 U.S.C. § 1610] may well meet the criteria in 25 C.F.R. Part 83 for achieving tribal status.

Pet. at 11-12. As this new course evolves, the State's Executive branch may well recognize the tribal status of all ANCSA villages without the necessity of 200 separate lawsuits.¹³

¹³ Evolution of the Alaska Attorney General's new position apparently began with its *amicus* brief filed with the Alaska Supreme Court in support of a petition for rehearing of that court's 3-2 decision in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988). In that decision the Alaska high court opined, as the State had argued for years, that most, if not all, Alaska Native villages lacked tribal status and hence sovereign immunity from suit in state court. In its *amicus* brief in support of rehearing, however, the State for the first time suggested that some Native villages might indeed have tribal status, at least to the extent of enjoying immunity from suit. See Pet. at 12 n.8. The Alaska Supreme Court denied the petition. Yet only a few months later that court issued a new decision, seemingly at odds with *Stevens Village*, holding that property owned by seventy tribal governments in Alaska is immune from state tax foreclosure proceedings under the provisions of the Indian Reorganization Act. *In the Matter of Taxes Owed to the City of Nome, Alaska*, 780 P.2d 363 (Alaska 1989). Several new cases are now pending in the Alaska Supreme Court which provide it with the opportunity to clarify its position on the tribal status of Native villages. *Nenana Fuel Co. v. Venetie*, Nos. S-3709 and S-3721 (filed Dec. 21, 1989 and Jan. 21, 1990 Alaska S. Ct.). *Harrison v. State of Alaska*, 784 P.2d 681 (Alaska

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY

This case is not worthy of plenary review. As petitioner concedes (Pet. at 16 n.11), the issue of the substantiality of respondents' federal claims does not justify review. Those claims will be tested on remand to the district court should the State elect to seek dismissal for failure to state a claim upon which relief can be granted.

As for the focal point of the petition—the question of the proper application of the Eleventh Amendment—this question is of little practical consequence

App. 1989), No. S-3953 (filed June 21, 1990 Alaska S. Ct.).

An example of the way Alaska has moved towards a generic state recognition of tribal existence is the enactment of a new regulation for the issuance of amended birth certificates for adoptions that occur in accordance with tribal custom but which fail to comply with the judicial adoption procedures of state law. 7 Alaska Admin. Code 05.700(b). Up until April 5, 1990, the State maintained, pursuant to the opinion of its Attorney General, that its Bureau of Vital Statistics could not issue amended birth certificates pursuant to a tribal council adoption "at least as long as the council's jurisdiction is in as much legal doubt as it is today." Op. (Inf.) Atty. Gen. in File No. 663-86-0248, April 16, 1986. Under the new regulation, of April 5, 1990, the Bureau will issue an amended birth certificate upon receipt of signed statements from the biological parents and "the governing body of the child's tribe" that a tribal customary adoption has occurred.

In short, this certiorari petition catches Alaska's judicial and executive branches in the midst of a period of rapid transition. Once Alaska's position crystalizes over the next year or two an assessment can be made to the degree of conflict, if any, with federal court precedent. Such an assessment now for purposes of the instant petition is premature.

here since under well-settled law, and regardless of the outcome of the petition, this case will continue as one seeking prospective relief. *Ex Parte Young*, 209 U.S. 123 (1908). Indeed, even as to that part of the case which *may* result in the expenditure of state funds, the disputed amount which might be paid is insignificant; any additional funds which the State *may* choose to spend will result not from the exercise of the federal judicial power but rather from the voluntary action of the State. See notes 8 and 9, *supra*. Moreover, the ruling below conflicts with no decision of this Court, and the alleged intercourt conflict on the issue is far too remote and uncertain to qualify for the exercise of the Court's discretionary jurisdiction.

Finally, while the tribal-status issue might warrant review in a proper future case, the present unsettled nature of the State's shifting position and that of its highest court make such review premature and inappropriate in this case.

I. THE ISSUE CONCERNING THE SUBSTANTIALITY OF RESPONDENTS' FEDERAL CLAIMS WAS CORRECTLY DECIDED AND DOES NOT MERIT REVIEW

In his opinion for the panel majority below, Judge Noonan found substantiality for the threshold purpose of federal subject-matter jurisdiction in respondents' federal equal-protection claim:

To wipe out [respondents'] political status on the ground that that status had an ethnic origin is itself a violation of the constitutional command not to discriminate on the basis of race. Paradoxical as it is, the allegation that the move from a tribal basis to a non-tribal basis for the [revenue-sharing] bonus was ra-

cially discriminatory is an intelligible claim. Any governmental action based on the racial character of those affected is presumptively invalid.

Pet. App. B at B-21. It is *not* "illogical" (Pet. at 17) to find an equal protection violation in state action which purports to accord equal treatment to all alleged similarly situated non-municipal communities (i.e., both Native communities with tribal governments and non-Native communities with no tribal presence), when (1) such communities are in fact *not* similar and (2) the insistence that they must be treated alike is based on the racial ancestry of the tribal members of the tribal communities. It is settled that "the Fourteenth Amendment also reaches 'a political structure that treats all individuals as equals,' *Mobile v. Bolden*, 446 U.S. 55, 84 (1980) (STEVENS, J., concurring in judgment), yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups [or, as here, Indian tribes] to achieve beneficial legislation." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467 (1982).

The respondents' also have pressed three related federal causes of action alleging unlawful State interference with (1) federal laws and policies designed to further tribal self-government, (2) the congressionally conferred right of the tribes qua tribes to contract with the states, and (3) the fundamental constitutional rights of expression, religion and association which form the basis of cultural and political self-determination. For essentially the same reasons applicable to respondent's equal protection claims, the panel majority found these causes of action to be

cognizable federal claims not so "plainly meritless" as to deprive the district court of subject-matter jurisdiction under the test of *Hagans v. Lavine*, 415 U.S. 528 (1974). Pet. App. B at B-21 - B-22.

The panel majority thus agreed with District Judge Holland's preliminary conclusion that "[i]t is very clear . . . that there is a serious question raised" in this litigation regarding the propriety of petitioner's actions. App. A-1 at 13.¹⁴

The State concedes that the substantiality question is presented somewhat gratuitously and does not satisfy the certiorari criteria of this Court's Rule 17.¹⁵ Respondent agrees.

II. THERE IS NO INTRA-CIRCUIT CONFLICT ON THE TRIBAL-STATUS ISSUE, AND NO OTHER REASON WARRANTING INTERLOCUTORY REVIEW

Petitioner also seeks review in this Court on the basis of an alleged intra-circuit conflict within the Ninth Circuit regarding the tribal status of Alaska Native villages. Pet. Br. at 7. Not only is petitioner wrong but the point is irrelevant, for an intra-circuit conflict, even if present, is not a proper basis for review in this Court. *See* Supreme Court Rule 10.

In response to this ill-conceived argument one need look no further than to the prominent absence of even

¹⁴ Significantly, petitioner never raised this issue in his petition for rehearing *en banc* in the Ninth Circuit. Nor did Judge Kozinski vote for *en banc* reconsideration on this (the only ground on which he dissented) or any other ground.

¹⁵ Although he presents the question for review, petitioner indicates that he does not desire to prevail on this ground but would rather have the Court decide the other two questions presented. Pet. at 16 n.11.

one circuit judge vote in favor of rehearing *en banc*, Fed. R. App. P. 35(a)(1), despite petitioner having advanced precisely the same argument below. Indeed, the decision below is fully in accord with, if not compelled by, the Ninth Circuit's two most recent decisions concerning Alaska village tribes, *Native Village of Tyonek v. Puckett*, 890 F.2d 1054 (9th Cir. 1989), cert. pending, No. 89-609 and *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989). See also *Native Village of Stevens v. Smith*, 770 F.2d 1486 (9th Cir. 1985), cert. denied, 475 U.S. 1121 (1986). The decisions in *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), cert. denied, 474 U.S. 1055 (1986), and *Alaska v. Venetie*, 856 F.2d 1384 (9th Cir. 1988), on which petitioner relies for the assertion of an internal circuit conflict—the former dealing with the wholly incomparable claims of Native Hawaiians, and the latter affirming a preliminary injunction restraining a village tribal tax court proceeding pending a determination of federal court jurisdiction and clarification of the record—not only do not conflict with the decision below, but were both cited in support of the decision. *Native Village of Noatak*, 896 F.2d 1157, 1160 (9th Cir. 1990).

More basically, the holding below that respondents are federally recognized Indian tribes is clearly correct. It is consistent with the fundamental nature of an aboriginal Indian tribe and with the tribal nature of aboriginal land claims. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). It is also consistent with the further recognition of village tribal land claimants in ANSCA and the additional recognition accorded under the Indian Reorganization Act. Moreover, Congress has consistently treated Alaska

Native villages during the past two decades as tribes and has *never* exercised its plenary power under the Indian Commerce Clause to take away the villages' inherent self-governing authority. Even the State now concedes that most Alaskan villages possess tribal status. Pet. Brief at 11-12. The State's disagreement is only with the process by which the Ninth Circuit reached the same conclusion. Under these circumstances it would be considerably more efficient for this Court to allow the State's shifting position to be fully considered on the merits by the Alaska Supreme Court. The Ninth Circuit correctly held that respondents are tribes with substantial federal claims. These diversions aside, we turn to the heart of the State's petition: the relevance of the Eleventh Amendment to suits by Indian tribes.

III. THERE IS NO MEANINGFUL INTERCIRCUIT CONFLICT ON THE ELEVENTH AMENDMENT ISSUE, THE NINTH CIRCUIT'S HOLDING IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT, AND THE ISSUE HAS LITTLE, IF ANY, PRACTICAL IMPORT IN THIS CASE

A. The Claimed Intercircuit Conflict

Petitioner contends that the holding that the Eleventh Amendment does not apply to damages suits by Indian tribes against states is in conflict with the Eighth Circuit's sixteen-year-old decision in *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974). While superficially true, it is not the sort of "conflict" which justifies the exercise of this Court's certiorari jurisdiction.

Most significantly, the Eighth Circuit's *Standing Rock* decision predates this Court's unanimous decision in *Moe v. Confederated Salish & Kootenai Tribes*,

425 U.S. 463 (1976). There this Court held that the Tax Injunction Act, 28 U.S.C. § 1341, does not bar suits by Indian tribes under 28 U.S.C. § 1362 for declaratory and injunctive relief against state taxing schemes. Since the *Moe* decision, every court which has addressed the issue, except for District Judge Kleinfeld, has held the Eleventh Amendment doctrine of state sovereign immunity inapplicable to federal-question suits by Indian tribes.¹⁶

In *Moe*, this Court held that tribes could sue the states to enjoin state tax collections, despite the Tax Injunction Act. The Court based its decision on Congress' 1966 exercise of its Indian Commerce Clause and Article III powers to authorize tribes to bring federal-question suits in the federal courts. 28 U.S.C. § 1362. Chief Justice (then Justice) Rehnquist wrote that section 1362 "contemplated that a tribe's access to federal court to litigate a [federal-question case]

¹⁶ See, e.g., *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079-80 (2d Cir. 1982); *Red Lake Band of Chippewas v. City of Baudette*, 730 F. Supp. 972 (D. Minn. 1990); *Navajo Nation v. New Mexico*, 14 Indian L. Rep. 3047 (D.N.M. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 595 F. Supp. 1077 (W.D. Wis. 1984); *Marty Indian School v. South Dakota*, 592 F. Supp. 1236, 1237 (D.S.D. 1984); *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1307 (N.D.N.Y. 1983); *Charrier v. Bell*, 547 F. Supp. 580, 585 (M.D. La. 1982); *Confederated Tribes of the Colville Indian Reservation v. Washington*, 446 F. Supp. 1339, 1134-50 (E.D. Wash. 1978) (three-judge court), *rev'd in part on other grounds*, 447 U.S. 134 (1980); *Native Village of Tyonek v. Puckett*, No. A82-369 Civil, op. tr. at 17 n.17 (D. Alaska 3 Dec. 1986) (*dictum*), *aff'd in part, rev'd in part on other grounds*, 890 F.2d 1054 (9th Cir. 1989), *cert. pending*, No. 89-609; *Aguilar v. Kleppe*, 424 F. Supp. 433 (D. Alaska 1976) (*dictum*). See also the Annotation on point at 65 ALR Fed. 649 (1983).

would be at least in some respects as broad as that of the United States suing as the tribe's trustee." 425 U.S. at 473; see also *id.* at 474.¹⁷ The court reasoned that since the United States could have brought the suit in question on behalf of the tribe without regard to the "broad jurisdictional barrier" of the Tax Injunction Act (*id.* at 470), so also could a tribe suing on its own behalf. *Id.* at 473-74.

With near uniformity (see note 16, *supra*), the lower federal courts have read *Moe's* construction of section 1362 as both authorizing tribes to sue states on federal-question grounds, and as displacing any Eleventh Amendment immunity the states might otherwise possess—because, as with the Tax Injunction Act, the Eleventh Amendment is no barrier to an action against a state by the United States suing as trustee for a tribe. *United States v. Minnesota*, 270 U.S. 181 (1926). The Eighth Circuit's *Standing Rock* decision, decided before and without the benefit of *Moe's* construction of section 1362, and whose analysis is inconsistent with *Moe*,¹⁸ has generally been disregarded. Even a district court which is bound by Eighth Circuit precedent has recently concluded that *Standing Rock* has no continuing vitality.¹⁹ The issue will thus un-

¹⁷ One of the "respects" in which the United States as trustee could, but a tribe suing under section 1362 could not, sue in federal court is on a non-federal cause of action. *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

¹⁸ The *Standing Rock* decision held narrowly that the United States could not have brought the tax challenge there in question on behalf of the tribe. 505 F.2d at 1140.

¹⁹ *Red Lake Band of Chippewas v. City of Baudette*, 730 F. Supp. 972 (D. Minn. 1990).

doubtedly be revisited by the Eighth Circuit and this Court will be provided with the benefit of its analysis should review of the issue be required.

In its initial decision in this case, the Ninth Circuit followed this solid line of precedent and held that even if the Eleventh Amendment applies to federal-question suits by Indian tribes, its immunity has been overridden by section 1362 as construed in *Moe. Native Village of Noatak v. Hoffman*, 872 F.2d 1384, 1389 (1989). But the announcement of this Court's decision in *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989), re-emphasizing that congressional intent to abrogate state sovereign immunity "must be both unequivocal and textual" (*id.* at 2401), caused the Ninth Circuit to alter its view on the effect of section 1362.²⁰ Pet. App. B at B-12. This change in view, however, ignores the point that section 1362 must be read by the lower courts as it has been authoritatively construed by this Court in *Moe. Maislin Industries v. Primary Steel*, 58 U.S.L.W. 4862, 4865, 66 (June 21, 1990). Thus this Court's construction authorizing tribal suits against states, *did*, in effect, "unequivocally and textually" appear in the statute and therefore must

²⁰In this respect the Ninth Circuit may have erred, although for obvious reasons the State has not challenged this ruling. *Dellmuth* was not decided in the context of an Indian jurisdictional statute like 28 U.S.C. § 1362, designed to foster Congress' protective trust responsibility to Indian tribes. As other courts have held (*see* n.16), a large measure of section 1362 would collapse if, contrary to Congress' clearly stated intent, Indian tribes were denied access to federal court to fully vindicate federal claims against states (rather than being forced to litigate a portion of their claims in traditionally hostile state courts).

be followed.²¹ As this Court explained in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983):

Congress contemplated that section 1362 would be used particularly in situations in which the United States suffered under a conflict of interest or was otherwise unwilling or unable to bring suit as trustee for the Indians.

Id. at 559 n.10.

Given Congress' purpose it would be anomalous, indeed, if tribes (throughout the U.S.) could obtain relief directly from states in the absence of such a conflict, but could not do so when the United States was conflicted out or otherwise unwilling to bring suit.

The Ninth Circuit nonetheless held to its judgment that a federal-question action such as this is not barred

²¹ Furthermore, this Court's stringent construction test comes into play only with respect to congressional action "placing a considerable strain on '[t]he principles of federalism that inform Eleventh Amendment doctrine.'" *Id.*, quoting *Pennsylvania State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984). The test is designed "[t]o temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure" *Id.* As Judge Noonan has cogently demonstrated (Pet. App. B at B-10 - B-19), however, and as discussed in the next argument, a suit against a state by a federally recognized Indian tribe—a suit between two sovereigns within "our constitutional structure"—simply does not "upset[] 'the fundamental constitutional balance between the Federal government and the States.'" *Dellmuth*, 109 S. Ct. at 2400, quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. at 238 (1985).

by the Eleventh Amendment (see next argument).²² That judgment accords (albeit by a different and more fundamental analysis) with the substantial body of judicial judgments allowing tribes to sue the states unhampered by the Eleventh Amendment. The uniformity of these judgments across the Nation is broken by nothing more than the long-ignored technical conflict with the Eighth Circuit's pre-*Moe* decision in *Standing Rock*. Moreover, the Ninth Circuit's fresh analysis below on an issue of first impression is contradicted by no decision of *any* court, including this one. Thus, the issue does not deserve attention by this Court unless a true conflict develops among the circuits, or unless the lower courts' handling of the issue portends some important result. Neither circumstance presently exists. Since federal court suits by a tribe against a state will invariably be grounded on section 1362, the Ninth Circuit's Eleventh Amendment analysis becomes virtually academic given the consistent interpretation of that jurisdictional statute. Such an issue is not worthy of certiorari.

B. The Alleged Inconsistency With This Court's Decisions

The applicability of the Eleventh Amendment to suits by Indian tribes is an open question in this Court. In *Arizona v. California*, 460 U.S. 605, 614 (1983), the Court, citing its earlier *dictum* in *United States v. Minnesota*, 270 U.S. 181, 193-95 (1926), merely "[a]ssum[ed], *arguendo*," that the Amendment applied to such a suit, and allowed the tribes to intervene in

²² Petitioner suggests that the Ninth Circuit has authorized tribes to sue states in federal court in "any case," rather than just federal-question cases. Pet. at 11 (emphasis in original); *id.* at 16 n.11. There is no basis for such a reading of the opinion below.

the case because the United States, to which the Amendment does not apply, was also seeking relief on behalf of the tribes. The issue clearly being an open one here, the decision below, by definition, cannot be inconsistent with the decisions of this Court. It also is not inconsistent with the principles of either State or Indian sovereignty established by the Court's decisions.

The State asserts an absolute "right to be free from suit in federal court in the absence of consent or without an explicit abrogation of that right by Congress." Pet. at 5. While the immunity conferred by the Eleventh Amendment is indeed a sweeping one, it plainly is not absolute: "the Eleventh Amendment has not accorded the States absolute sovereign immunity in federal court actions. The States are subject to suit by both their sister States and the United States." *Nevada v. Hall*, 440 U.S. 410, 420 n.19 (1978).²³

Petitioner thus overlooks that the bedrock principle of Eleventh Amendment immunity, as construed by the Court, is, in Hamilton's pivotal words, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an *individual* without its consent." *The Federalist* No. 81 (emphasis added); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890); accord, e.g., *Pennsylvania v. Union Gas Co.*, ___ U.S. ___, 109 S.Ct.

²³ "Further, prospective injunctive and declaratory relief is available against States in suits in federal court in which state officials are the nominal defendants." *Nevada v. Hall*, 440 U.S. at 420 n.19; see part III C, *infra*. And, as the *Nevada* Court held, there is nothing in the Constitution prohibiting the courts of a state from entertaining a tort action for damages against a sister state.

at 2297-98 (Scalia, J., concurring in part and dissenting in part). This central concern of the Amendment with suits by *individuals* forms the basis for the Court's holdings that the Amendment does not limit suits by the United States against a state, *United States v. Texas*, 143 U.S. 621 (1892), nor suits by one state against another, *South Dakota v. North Carolina*, 192 U.S. 286 (1904). As to these two classes of cases, it has been repeatedly held that any immunity from suit that a state might have had was surrendered "in the plan of the convention." *Monaco v. Mississippi*, 292 U.S. 313, 324 (1934), quoting Hamilton in *The Federalist* No. 81.²⁴

As the opinion below persuasively demonstrates, a suit by a sovereign Indian tribe against a state does not fall within this core concern of the Amendment and related considerations of federalism, any more than does a suit by a state or the United States against a state. As "domestic dependent nations" legally distinct from both the states and the United States, but not "foreign," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831),²⁵ and which constitute "this

²⁴ The single exception to the Court's confinement of Eleventh Amendment principles to suits by individuals is its holding that a suit against a state by a *foreign* state, which "lies outside the structure of the Union," *Monaco*, 292 U.S. at 330, is barred. Indian tribes, of course, do not lie "outside the structure of the Union," and none of *Monaco's* reasons for barring suits by foreign states is applicable to the Indian tribes. See e.g., 292 U.S. at 330.

²⁵ See also, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (tribes viewed "as distinct, independent political communities, retaining their original natural rights"; "a people distinct from others"); *Santa Clara Pueblo v. Martinez*, 436 U.S.

third source of sovereignty in the United States,"²⁶ the Indian tribes stand on a constitutional footing comparable to that of the United States when it comes to federal-question suits against the states. "While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan." *Monaco*, 292 U.S. at 329.²⁷

49, 56 (1978) ("[a]s separate sovereigns pre-existing the Constitution"); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973), quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886) ("not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided"); see generally *United States v. Wheeler*, 435 U.S. 313 (1978).

²⁶ C. Wilkinson, *American Indians, Time, and the Law* 103-104 (1987).

²⁷ It is often recognized that in some respects tribes "have a status higher than states," *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959), or that they "occupy a sovereign status somewhat comparable to that of the States." *Oneida Indian Nation v. New York*, 520 F. Supp. 1278, 1306 (N.D.N.Y. 1981), *aff'd in part, vacated on other grounds*, 691 F.2d 1070 (2d Cir. 1982); and see *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (concurring and dissenting opinion by Justice Stevens pointing out that Indian tribes have been afforded more deference than states). Indeed, in a number of important respects Indian tribes enjoy immunities from state action that are greater than the immunities of the United States and its officers from comparable forms of state action. See C. Wilkinson, at 98 & nn. 65-69 (1987). Tribes "exercise local sovereignty in much the same way that states do outside of Indian country," *id.* at 116, as well illustrated by this Court's recent decisions in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *LaPlante*.

The "plan of the convention" strongly suggests this result. For upon ratification of the Constitution the states lost *all* authority over Indian affairs, "the regulation of which, according to the settled principles of our Constitution, are committed *exclusively* to the government of the Union." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832) (emphasis added). See also, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law").²⁸

Petitioner argues that the decision below "defies historical logic," because the Framers "had not the

²⁸ In *Pennsylvania v. Union Gas*, ___ U.S. ___, 109 S. Ct. 2273 2281-85 (1989); *id.* at 2295 (White, J., concurring in relevant part), the Court held that the Interstate Commerce Clause empowers Congress to abrogate the immunity of the states from suit in federal court, because the states surrendered that power when they adopted the Constitution. There can be no doubt, then, that under the Indian Commerce Clause Congress has the power to override any sovereign immunity the States may possess. But the latter clause has an even broader effect than the former (see, e.g., *Cotton Petroleum Corp. v. New Mexico*, ___ U.S. ___, 109 S. Ct. 1698 (1989)), though they are contained in the same constitutional provision, because the Indian Commerce Clause of its own force effects a complete divestiture of state sovereignty—so that upon the adoption of the Constitution there was no state sovereignty for Article III and the Eleventh Amendment to preserve.

The State thus mischaracterizes the decision below when it claims that the Ninth Circuit's "logic" means "that the States waived immunity from suit [merely] by agreeing to a Constitution which mentions federal power over Indian matters." Pet. at 6, 9. It is not the mere "mention" of the power, but the complete surrender of authority over the subject within the "constitutional structure," that effects the "waiver."

Indian tribes in view when they opened the courts of the Union to [specified] controversies. . . ." Pet. at 10, quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 18. But it would be anomalous if the Framers, who vested Congress with plenary and exclusive power over Indian affairs while stripping the states of all such authority, had simultaneously determined to constitutionally preclude Indian tribes from resorting to the courts of the Nation to seek a remedy for any such unconstitutional state interference, leaving them only to "appeal . . . to the tomahawk, or to the [federal] government." *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. Perhaps "the idea of [an Indian tribe] appealing to an American court of justice for an assertion of right or a redress of wrong" did not occur to the Framers, as it "had perhaps never entered the mind of an Indian or his tribe." *Id.* If that be so, it is all the more reason to conclude that the Framers did not intend the Eleventh Amendment to apply to tribes, as distinguished from "citizens" and "foreign states" (which were at least mentioned by name), in the event that Congress should exercise its Article III and Indian Commerce Clause powers—as it did with the 1966 passage of 28 U.S.C. § 1362—and authorize tribes, who now "are entitled to take their place as independent qualified members of the modern body politic,"²⁹ to bring federal-question suits in the federal courts.

The Ninth Circuit has correctly perceived the principles of federalism and the constitutional structure applicable here. Its analysis is not in conflict with any

²⁹ *Arizona v. California*, 460 U.S. 605, 615 (1983), quoting *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968), quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).

decision of this or any other Court. While the issue may eventually call for final resolution by the Court, such review most properly should await a case, should there be one, in which the question has reasonably clear consequences necessitating an answer—after the issue has received full deliberation among the lower federal courts.

C. The Issue Has Little, If Any, Practical Import In This Case

Regardless of the applicability of the Eleventh Amendment *vel non*, the district court plainly erred in dismissing the *whole* case on state-sovereignty grounds. It continues to be settled law, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), that the Amendment does not bar a suit against a state official in his official capacity for prospective declaratory and injunctive relief, “‘because official-capacity actions for prospective relief are not treated as actions against the State.’” *Will v. Michigan Dept. of State Police*, ___ U.S. ___, 109 S. Ct. 2304, 2311 n.10 (1989) (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)); see also, e.g., *Papasan v. Allain*, 478 U.S. 265, 282 (1986); *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977); *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974). Respondents seek such prospective relief in order to be freed of the State’s policy of treating Native villages as “racially exclusive groups” and to enable them to appeal to the Alaska Legislature as federally recognized tribes. They are entitled to an adjudication on the merits regardless of any damages which it may claim.

Moreover, the damages claim is highly uncertain in the present posture of the case. Aside from the fact that the viability of respondents’ federal claims has not been decided, the extent of damages, if any, also remains controverted and undecided.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

No. A85-503 Civil

NATIVE VILLAGE OF AKIACHAK, NATIVE VILLAGE OF
NOATAK, and CIRCLE VILLAGE, on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

EMIL NOTTI, as Commissioner, DEPARTMENT OF
COMMUNITY AND REGIONAL AFFAIRS, STATE OF
ALASKA,

Defendants.

FILED

MAR 03 1986

PRELIMINARY INJUNCTION

Plaintiffs have moved for a preliminary injunction preventing Defendant from distributing certain funds remaining in his possession from a 1986 fiscal year appropriation to the Department of Community and Regional Affairs by the Alaska State Legislature in furtherance of revenue sharing for the benefit of unincorporated communities. The motion is opposed. The Court has heard oral argument. For the reasons hereinafter set forth, the motion is granted.

Background to Litigation

In 1980, the Alaska Legislature enacted AS 29.89.050 which made provision for state aid to "Native village governments". The statute provided in pertinent part:

Sec. 29.89.060. State aid to Native village governments. The State shall pay \$25,000 to a Native village government for a village which is not incorporated as a city under this title. In this section, "Native village government" means

(1) a local governing body organized by authority of the Act of Congress of 25 U.S.C. 476 (the Act of Congress of June 18, 1934)

(2) a traditional village council or, if there is no traditional village council, the paramount chief or other governing body of a Native village which meets the requirements of 43 U.S.C. 1601-1628 (Alaska Native Claims Settlement Act). (§ 3 ch 155 SLA 1980)

The Court takes note of the fact that the State of Alaska still embodies vast areas having, for all practical purposes, no local government other than that available through AS 29.03.010-.020 which makes certain limited provisions for what is quite appropriately denominated as "the unorganized borough". In fact, there are many isolated communities within the unorganized borough. Some of them are incorporated as municipalities under various of the provisions of title 29 of Alaska Statutes. Others are unincorporated. Of the latter, many are the locus of active Native organizations. They are created or recognized primarily under federal law pursuant to or for purposes of implementing various of the federal statutes pertaining to Alaska Natives. *See, for example*, 25 U.S.C. § 476, 43 U.S.C. §§ 1601-1628. Many of the Native communities are, at least for purposes of federal law, recognized as "Indian tribes". 25 U.S.C. § 450b(b).

The Court has no doubt that the above-quoted statute was an attempt by the Alaska Legislature at funding, from its short-lived excess wealth, some limited public services in the unorganized borough for the people of unincorpor-

ated Native communities. The statute would appear to have been a well-intended, but in retrospect very troublesome, piece of legislation, for it appears that a question was raised almost immediately about the selection of "Native village governments" as above defined by AS 29.89.050 as the recipients of state aid.¹ Someone undoubtedly raised with Defendant Commissioner the question: "What about the non-Native, unincorporated village communities?" Defendant Commissioner in turn appears to have sought guidance from the Attorney General of the State of Alaska who, in April and September of 1981, wrote opinions as to the constitutionality of various aspects of AS 29.89.050.

The first attorney general's opinion raised serious questions as to the constitutionality under the Constitution of the State of Alaska of any law which tended to constitute unincorporated entities as "local government units". *See* Attorney General Opinion to Dept. of Community & Regional Affairs, dated April 27, 1981. The opinion counselled amending the statute in question to "open the class of beneficiaries to other entities and other communities and including them, on application, in the distribution out of a concern that section 50 embodied an equal protection violation. *Id.* at 4. This first attorney general's opinion also alluded briefly to the prospect of public funds being expended for private purposes if used by tribal organizations for non-governmental, corporate purposes. *Id.* at 4.

It would appear that in response to the latter problem the commissioner adopted regulations as regards applicants for state aid monies as authorized by AS 29.89.090. The regulations, effective August 20, 1981, provided in pertinent part:

¹ Unfortunately, the question which was raised was not promptly addressed by the Alaska Legislature and did not find its way to court until the program, as originally enacted, was within a few months of its end and all but the last one-half of one year's appropriation distributed.

(e) An applicant which is a Native village government must meet the following standards to qualify for a payment under AS 29.89.050:

(1) the applicant agrees to irrevocably dedicate the payment the applicant receives under AS 29.89.050 for a public purpose other than general administration of the Native village government; and

(2) the applicant provides its residents with at least one of the public facilities and services listed in AS 29.48.030(1)-(6), (8)-(21) and (23) as of July 1 of the entitlement year²

The second opinion of the attorney general stated that AS 29.89.050 was unconstitutional "if read literally to restrict aid to Native villages." Attorney General Opinion to Dept. of Community & Regional Affairs, dated September 2, 1981. The opinion went on to counsel that the commissioner should simply read out of AS 29.89.050 the words "Native" and "government" as well as the definition of "Native village government". *Id.* at 1. The opinion concludes, after discussion of certain equal protection implications of the restrictive language, that:

We believe that the interpretation of AS 29.89.050 to authorize grants of state money to all villages is the only interpretation consistent with our constitution.

Id. at 3.

The latter attorney general's opinion represents, as do the parties now before the Court, that in 1981 and in

² AS 29.48.030(a), to which the above regulation presumably refers, sets out various powers which a municipality may exercise. Those enumerated in the quoted regulation are streets and sidewalks, sewers, harbors etc., watercourse and flood control, health services etc., cemeteries, cold storage plants, preservation etc. of historic sites, and emergency medical services.

subsequent years the Alaska Legislature funded AS 29.89.050 with at least some level of knowledge that the Defendant Commissioner was then implementing the statute as interpreted by the attorney general—that is, so as to benefit all unincorporated communities, not just those having a "Native village government". Least the latter be misunderstood, it is the Court's conclusion that there was, up until the 1985 Alaska State Legislature, no express legislative recognition of the Defendant Commissioner's interpretation of section 50. Rather, what appears to have happened is that the Defendant Commissioner's budget was proposed to the legislature in sufficient amount to fund all anticipated applicants, both Native village governments and other unincorporated communities. What complicates this budgetary matter is the fact that all parties also appear agreed that the legislature never completely funded this state aid program. Thus, although section 50 would appear to provide for \$25,000 per applicant, the Court understands that the legislature never appropriated enough money that all expected applicants could have obtained the full \$25,000. Applicants apparently received a pro rata share of the appropriation.

The state aid program under section 50 appears to have been administered as above discussed through fiscal year 1985—that is, the state's fiscal year ending June 30, 1985.

The 1985 session of the Alaska State Legislature, in conjunction with recodifying the municipal code (Title 29), repealed section 29.89.050 and enacted a substitute state aid program under AS 29.60.140. this new program, entitled "State aid to unincorporated communities", provided in pertinent part:

(a) The department shall pay to each unincorporated community an entitlement of \$25,000 each fiscal year to be used for a public purpose. The department with advice from the Department of Law shall determine whether there is in

each unincorporated community an incorporated nonprofit entity or a Native village council that will agree to receive and spend the entitlement. If there is more than one qualified entity in an unincorporated community, the department shall pay the money under the entitlement to the entity that the department finds most qualified to receive and spend the money. The department may not pay money under an entitlement to a Native village council unless the council waives immunity from suit for claims arising out of activities of the council related to the entitlement. . . .

(b) In this section "unincorporated community" means a place in the unorganized borough that is not incorporated as a city and in which 25 or more persons reside as a social unit. (§ 16 ch 74 SLA 1985)

The reenacted state aid program is structured in a fashion which addresses most if not all of the concerns expressed by the attorney general in his two above-mentioned opinions. The amended state aid program, by the express terms of the recodified municipal code, became effective January 1, 1986. Because of the existence of varying effective dates, it is abundantly clear that the legislature selected the latter after some deliberation.

Why the latter date would have been selected, when in fact the state aid program as well as state budgets are operated on a July 1 to June 30 fiscal year, is not at all clear to the Court. Applications for state aid under the subject program are received in the fall, are partially funded (the Court understands 50% of the annual entitlement) before the end of a calendar year, and the balance, at least as to fiscal year 1986, is due to be paid out on or about March 1, 1986. Because AS 29.60.140 did not become law until January 1, 1986, it appears that the

Defendant Commissioner has received applications for state aid under the subject program as originally constituted (AS 29.89.050) and has partially funded these applications with monies provided by the 1985 legislature from the department's fiscal 1986 budget. As of January 1, 1986, the state aid to unincorporated communities statute became operative (AS 29.60.140), and it is now contended by the state that the balance of the department's fiscal year 1986 appropriation for this program should be made under the new statute.³ Plaintiffs, however, contend that they should receive the full \$25,000 state aid payment under section 50 as originally written—that is, restricted to "Native village government" applicants in preference to other unincorporated communities.

To digress for a moment, Defendant has alluded to the standing of Plaintiffs Native Village of Akiachak and Circle Village in this case. It has been suggested by the Defendant that the Native Village of Akiachak is in fact an incorporated municipality and therefore not eligible under either the old or the new state aid program and that Circle Village has not applied for state aid in fiscal year 1986. An incorporated village would appear to have no standing whatsoever to sue for state aid to unincorporated communities or village governments. Without an application having been filed, the Court does not perceive that Circle Village would have any standing either, since it would appear that they could not in any fashion be harmed—without an application, they would not be entitled to an allocation under the statute. The Court does not have a motion to dismiss before it but, for purposes of the motion for preliminary injunction, it would appear that the Court has before it only one viable plaintiff. The latter would

³ The state contends that AS 29.60.140 renders this suit moot. Not so. The mootness argument simply begs the question of which statute applies to the 1986 appropriation and applications approved by Defendant for allocation from that fund.

appear not to present a serious problem in light of the fact that, in opposing class certification as sought by Plaintiffs in a separate motion not yet ripe for decision, Defendant Commissioner has indicated that "[A] final judgment in favor of any one party will change the way the law is administered for all similarly situated parties." Opposition to Motion for Class Certification, at 2, filed Feb. 18, 1986.

Tests for Granting Preliminary Injunction

An applicant for a preliminary injunction must meet one of two prevailing tests before being entitled to such relief. Under the "traditional" tests, Plaintiffs must show:

- (1) a strong likelihood of success on the merits;
- (2) that the balance of irreparable harm favors the movant; and
- (3) that the public interest favors granting an injunction.

Aleknagik Natives, Ltd. v. Andrus, 648 F.2d 496, 501 (9th Cir. 1980).

Under the "alternative" test, a preliminary injunction is appropriate where the applicant demonstrates either:

- (1) a combination of probable success on the merits and the possibility of irreparable injury, or
- (2) that serious questions are raised and the balance of hardships tips sharply in movant's favor.

Id. at 502; *William Ingles & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 526 F.2d 86, 88 (9th Cir. 1975). Under this "alternative" test, this Court must consider the public interest as a third factor. *American Motorcyclist Association v. Watt*, 714 F.2d 962, 967 (9th Cir. 1983).

In the last analysis, the foregoing two sets of standards are the extremes of a factual and legal continuum, *William Ingles & Sons Baking Co.*, 526 F.2d at 88, which circumscribes and defines the manner in which this Court is to exercise its discretion in granting or denying preliminary injunctions. *American Motorcyclist Association*, 714 F.2d at 965.

The key element in applying the foregoing tests is the relative hardship to the parties, as it is this factor which is employed to locate any given case in the continuum between the last two statements of the test. *Benda v. Grand Lodge of International Association of Machinists, etc.*, 584 F.2d 308, 314-15 (9th Cir. 1978); *cert. dismissed* 441 U.S. 937 (1979); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

Discussion

Balance of Hardship/Irreparable Harm

Since the balance of hardship and the impact of irreparable harm are the critical factors in granting preliminary injunctions, we address that subject first.

The Defendant Commissioner is about to disburse the balance of his fiscal year 1986 appropriation for state aid to unincorporated communities, however constituted. That distribution will apparently take place between March 1 and March 15, 1986, and will result in exhaustion of this fund. Once paid out, the monies in question will be spent by the recipient organizations and cannot be retrieved. There would appear to be no probability of the Alaska Legislature effecting a supplemental appropriation for fiscal year 1986, nor does the Court conceive that it would have the power to require such. Thus, to the extent that the Defendant Commissioner's allocation of the funds available to him to all applicant unincorporated communities will result in a diminution of that distribution which could be made were the distribution made only to Native village governments, as defined in AS 29.89.050,

Native village governments will be deprived of money that, for all practical purposes, can never be replaced. The loss, although strictly monetary, will in a real sense be irreparable.

On the other hand, it is contended by the State that programs beneficial to the general public of non-Native unincorporated communities will be disrupted if the Defendant Commissioner is restrained from distributing the state aid appropriation as he has done in the past. While the latter appears to be a legitimate and appropriate matter for the Court to consider under the "public interest" heading of the test for granting preliminary injunctions, the Court does not perceive that the Defendant Commissioner or the State of Alaska is in any real fashion thereby exposed to irreparable harm. A supplemental appropriation is possible—if unlikely—even though it cannot be required.

Irrespective of whether the State's argument be characterized as a "public interest" concern or a "hardship" factor, since this Court does not envision that it would order the Defendant Commissioner to make a disbursement of disputed funds to "Native village governments" on a preliminary basis, the hardship for non-Native unincorporated communities is really a problem of delay or timing, not one of a probable irrevocable loss. Put somewhat more simply, the Court perceives that delaying disbursement of a portion of the fiscal year 1986 state aid appropriation to unincorporated communities does not amount to irreparable harm, even though the Court recognizes that it may present some short-term hardship in the delivery of some intended service. As a consequence, the Court perceives that there is a real risk of irreparable harm to Plaintiffs which is balanced against some hardship—but not irreparable harm—to villages such as Noatak.

Probability of Success

The Court is not prepared to say that it finds a strong likelihood of success on the part of Plaintiffs as to the

merits of their claim. However, the Court is convinced that there is most definitely a serious question presented by the Plaintiffs' complaint. The Court was amazed, at first reading, that the attorney general would take the position that the Defendant Commissioner could so completely emasculate the plain language of AS 29.89.050 and still proceed with the state aid program.

Although the attorney general purports to interpret AS 29.89.050 in such a fashion as to render it in his view constitutional, the deletions which he counselled are in reality no interpretation at all. Rather, the deletions are an outright excision of unequivocal language—a rewriting of section 50.

Clearly where there is room for more than one interpretation, the attorney general and courts must always select that interpretation which leads to a constitutional result. Here there is absolutely no room for doubt but that the Alaska Legislature intended to provide state aid to "Native village governments" as defined in section 50. There is no ambiguity, there is no conflict, there is no uncertainty about what the legislature intended. The Court doubts seriously that such a substantive redirection of the originally stated scope of section 50 can be achieved administratively for the purpose of salvaging what is contended to be an unconstitutional statute. This aspect of the matter alone is a sufficiently serious question to cause the Court to require maintenance of the statute quo so as to protect Plaintiffs.

The parties have, of course, presented some more substantive and basic arguments attacking and supporting the position of the attorney general that the state aid to Native village governments statute is unconstitutional. The Court has reached no conclusion at this time as to whether Plaintiff Noatak or a similarly situated entity is likely to prevail on the underlying question of the constitutionality of AS 29.89.050 as enacted. It is very clear, however, that

there is a serious question raised. As set out in the discussion portion of this order, Native village councils and similar organizations, while not local government units under the Constitution of the State of Alaska, are beyond any question federally recognized as (for lack of a better term) quasi-governmental entities. At this preliminary stage, the Court is persuaded that there is a least a possibility, if not a probability, that the special status of "Native village governments" under federal law is sufficient to withstand an equal protection challenge. In this regard, the State has consistently characterized the "Native village government" rubric of section 50 as being a racially tainted term. The Court has substantial doubts that this characterization is appropriate.

In summary, then, the Court concludes that at least Plaintiff Noatak is confronted with possible irreparable harm and that the balance of hardship tips definitely in its favor. While the Court is not prepared to say that a plaintiff will probably succeed in this case, there is most certainly a serious question raised as regards Defendant Commissioner's implementation of AS 29.89.050. There is also a serious question as regards which of section 50 or AS 29.60.140 should be applied in the distribution of funds remaining in Defendant Commissioner's fiscal year 1986 appropriation for state aid to unincorporated communities.

State Aid Program Regulations

Plaintiffs also seek to have this Court enjoin Defendant Commissioner from enforcing his regulation that state aid monies be devoted to a public purpose rather than general administration of the recipient. On the basis of the preliminary and somewhat abbreviated presentation of this point, the Court is not satisfied that there is any basis for enjoining this regulation.

The Court does not perceive that 19 AAC 39.051(e)(1) is in any respect intertwined with the difficulties presented

by the attorney general's opinion of the constitutionality of AS 29.89.050 as originally written. Defendant Commissioner has clear authority to adopt regulations "necessary to carry out the purposes of AS 29.89.010 - 29.89.100." AS 29.89.090.

There would appear to be no room for doubt but that the Constitution of the State of Alaska requires that appropriations of public money be for a "public purpose". Article IX, Section 6, Constitution of the State of Alaska. Assuming, as is obviously the case, that monies have come and will continue to come to Plaintiff Noatak and other similar village groups under both the original state aid program and/or the amended program, there would appear to this Court to be no basis whatsoever for an argument that those monies need not be devoted to a public purpose. It is clear that they must be so devoted. Preliminarily, Defendant Commissioner's regulation on this subject would appear to be a reasonable approach to the necessity that monies being disbursed through appropriations to the Commissioner for state aid be expended for a public purpose. Entities such as Plaintiff Noatak being something other than municipal corporations or other local government units recognized by the Constitution of the State of Alaska, it does not at first blush appear unreasonable to this Court that Defendant Commissioner would preclude state aid recipients who are not local government units from using state aid for general administration purposes. There would appear to be a real risk of misuse of the state aid funds if they could be applied to the general administrative expenses of entities which are not local government units.

Bond

The parties have not addressed the question of an appropriate bond. Rule 65(c), Federal Rules of Civil Procedure, expressly provides that no preliminary injunction shall issue without the applicant providing security for the payment of costs and damages if it is later found that the

injunction was improvidently granted. The Court does not perceive, and the parties have not suggested, that there is any substantial risk of damages to a party in this case. The exposure, therefore, would appear to be limited to costs to which the State might be entitled should Plaintiffs not prevail.

The Court deems a bond in the amount of \$250 to be adequate protection for costs at this initial stage of the proceedings. Upon application of Defendant, the Court will review this aspect of the matter at a later date should it subsequently appear that such bond is substantially inadequate to cover costs which might be awarded Defendant.

Class Certification

The Court has hereinabove alluded to both the posture of Plaintiffs Akiachak and Circle and the Plaintiffs' motion for class certification. As already intimated, the Court perceives that there are serious problems with the role of Akiachak and Circle in this case. The Court solicits these Plaintiffs to consult with Defendant as regards their withdrawal from this case. Similarly, the Court calls upon Plaintiff Noatak to confer with the Defendant as regards the need for class certification in this case. In light of Defendant's response to the motion for class certification, such would appear to be unnecessary. The Court already has some doubts as to the practical economics of this case, since this action was not brought until substantially all of the money involved between 1980 and 1986 had been disbursed and the statute in question amended as to fiscal year 1987 and thereafter. In short, the expense of class certification would appear to this Court to be of dubious economic justification in light of the sum probably in controversy and, at least superficially, class certification would appear to be unnecessary in light of the Defendant's representation.

Defendant Enjoined

In consideration of the foregoing, Defendant Emil Notti, Commissioner of the Department of Community and Regional Affairs, his deputies, all other employees of the Department of Community and Regional Affairs, and any others acting in concert with them, are herewith enjoined and restrained from disbursing from his fiscal 1986 appropriation for state aid to unincorporated communities or Native village governments, whether under AS 29.89.050 or AS 29.60.140, money which is necessary to completely fund the application of Plaintiff Native Village of Noatak and all other Native village government applicants for fiscal year 1986 state aid.

As this matter now stands, the Court appears to have before it only one plaintiff applicant who is entitled to the benefit of the foregoing injunction. However, class certification has been sought and the Court has taken note of Defendant Commissioner's representation through counsel that he intends to treat all applicants alike such that if he must make provision for full funding of one applicant, he will do likewise for all other applicants who would properly be characterized as Native village governments under AS 29.89.050 as enacted by the legislature and without the modifications urged by the attorney general. Thus it is the intent of this order that Defendant Commissioner reserve sufficient funds from his fiscal year 1986 appropriation for state aid, whether under AS 29.89.050 or AS 29.60.140, to pay the maximum \$25,000 entitlement to each "Native village government" applicant and to hold said funds pending final resolution of this case. Subject to the foregoing, Defendant may make such further distribution to all applicants on a pro rata basis as he shall determine.

This restraining order shall become operative upon the posting of the required bond.

DATED at Anchorage, Alaska, this 3rd day of March,
1986.

/s/ H. Russel Holland
United States District Judge

cc: Lawrence Aschenbrenner
Hal Brown

APPENDIX B

ATTORNEY GENERAL, STATE OF ALASKA MEMO IN SUPPORT OF MOTION TO DISMISS

After the revenue-sharing program was restructured in 1981 so that all unincorporated communities could participate, funds continued to be distributed to each community as appropriated by the legislature.⁴ The legislature has never funded the program fully, so communities did not receive the \$25,000 authorized annually by AS 29.89.050, but somewhat lesser amounts both before and after the program was expanded. The Noatak Village Council received its share each year of the program. In Circle, the Village Council failed to apply for the funds for FY 83

⁴ The decision to expand the program was made in 1981. The next legislative session, in 1982, appropriated funds under the expanded program for the fiscal year beginning July 1, 1982 (Fiscal Year 1983). Thus FY 1981 and FY 1982 funds were administered under the original restrictive program; FY 1983, FY 1984, and FY 1985 were administered under the expanded program; and FY 1986 and subsequent years are under the new statute, AS 29.60.140, which codifies the expanded program of FY 83-85.

The amount received per community for each year of the program is as follows:

| | | |
|----------------------|---------|----------|
| restrictive program: | FY 1981 | \$21,079 |
| | FY 1982 | \$23,194 |
| expanded program: | FY 1983 | \$19,933 |
| | FY 1984 | \$21,037 |
| | FY 1985 | \$23,104 |
| per AS 29.60.140: | FY 1986 | \$22,785 |

Pro-rata sharing of shortfalls for this program is required by AS 29.60.170 (former AS 29.89.080). Contrary to plaintiffs' mistaken assumption, these shortfalls were not due to expansion of the program (the legislature knew the full number of eligible villages under the expanded program when it appropriated funds for them), but because the legislature chose, for its own fiscal reasons, never to fund the program at full levels. For more detail see Part II *infra*, and affidavit of Rutherford, Exhibit A.

and FY 84, so the funds for Circle were administered through

. . .

APPENDIX C

EXHIBIT C A85-503

Come now plaintiffs and in response to defendants first set of interrogatories answer as follows:

Interrogatory No. 1: Paragraph 18 of the Complaint states that plaintiffs and their class are owed \$853,587.51. State in detail how this figure was arrived at.

Answer: Pursuant to AS 29.89-050 each "Native Village Government" in an unincorporated community was entitled to revenue sharing funds of \$25,000. Each fiscal year since this statute was passed sufficient funds were appropriated to provide each Native Village Government that applied with its full entitlement of 25,000. For the reasons set forth in paragraphs 15 and 16 of the Complaint Plaintiffs and their class Members did not receive their due. As set forth in the table below, Plaintiffs and their class received less each year than they were entitled. The total figure owed was reached by multiplying the number of Native Village Governments funded times the difference between 25,000 and the amount disbursed for each year. The totals for each year were added to reach the figure of \$853,587.51.

| Number of Native Villages Funded under AS29.89.050 | | Funds Appropriated Under AS29.89.050 |
|---|-----------|---|
| 1981 | 54 | 1,495,322.00 |
| 1982 | 41 | 1,275,683.00 |
| 1983 | 50 | 1,335,568.00 |
| 1984 | 54 | 1,556,738.00 |
| 1985 | 53 | 1,617,280.00 |
| Funds Disbursed to Native Village Governments Pursuant to AS29.89.050 | | Difference Between Statutory Entitlement and Amount Disbursed |
| 1981 | 21,079.64 | 3,921.36 |
| 1982 | 23,194.23 | 1,805.77 |
| 1983 | 19,933.85 | 5,066.15 |
| 1984 | 21,037.00 | 3,963.00 |
| 1985 | 23,104.00 | 1,896.00 |

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil Action No. A85-503

NATIVE VILLAGE OF AKIACHAK, NATIVE VILLAGE OF
NOATAK, AND CIRCLE VILLAGE ON BEHALF OF THEM-
SELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

EMIL NOTTI, AS COMMISSIONER OF DEPARTMENT OF
COMMUNITY AND REGIONAL AFFAIRS, STATE OF
ALASKA,

Defendants.

OPPOSITION TO MOTION
FOR CLASS CERTIFICATION

Defendant opposes plaintiffs' motion for class certification. Class treatment of this case will in no way make its administration easier or aid any affected entities, but will complicate the case for no good reason.

1. As plaintiffs admit, resolution of the one large legal question in this case—whether former AS 29.89.050 should have been administered in the manner plaintiffs seek—will affect all members of any putative class whether or not this is a class action. A final judgment in favor of any one party will change the way the law is administered for all similarly situated parties. Thus, as far as the legal issue is concerned, there is no need for or advantage in class treatment.

2. Beyond that large legal issue, however, class treatment would be extraordinarily burdensome because the

eligibility of any one claimant under AS 29.89.050 is a factual matter. Each community would need to demonstrate that it had applied in each past year of the program; that its application was proper and approved; and that its expenditures were for a proper purpose. Even beyond that, additional questions of eligibility would arise because several communities on plaintiffs' list of "class members" are subject to challenge for various factual reasons.* In short, after ruling on the common legal question, the court could then be faced with trying, in the same forum, as many as 65 individual factual cases. There is one common legal question, but class status does not advance resolution of that question; and at the same time, individual factual issues will bog the court down in dozens of mini-trials which are better left to the administrative process or state courts.

3. Finally, as to the adequacy of class representation, plaintiffs misconstrue the law. It is not so much a matter of the competence of counsel as it is of whether the representative parties have the same interests as the class. Although Noatak and Circle may qualify (though Circle's status under the original AS 28.89.050 may be in doubt), there is no way Akiachak can be an adequate class representative. Akiachak is and has been a city since the program started, right through the repeal of AS 28.89.050, to the present. It is simply not an unincorporated community. Indeed, Akiachak has the weakest argument for eligibility by far of any community on plaintiffs' "list," so it cannot be considered a proper representative.

* Their list includes four communities which are within organized boroughs and so are ineligible (see 1981 Inf. Op. Att'y Gen. (Nov. 18; 366-261-82); 1985 Inf. Op. Att'y Gen. (May 15; 366-447-85). It also includes eleven communities in which Natives are a minority, so the Native council's claim to be the village "government" is in serious doubt. It also includes Akiachak, which is ineligible because it is a city. And if the state is correct that a Native entity may not be a "government" outside of Indian country, we will face detailed factual disputes over virtually every one of the 65 villages on plaintiffs' list.

In summary, there are no advantages to class certification, and class status would create a morass of factual issues for the court to deal with. The motion should be denied.

DATED: February 18, 1986.

HAROLD M. BROWN
ATTORNEY GENERAL

By: Stanley T. Fischer, Ass't Att'y Gen'l
for Douglas K. Mertz
Assistant Attorney General

APPENDIX E

ATTORNEY GENERAL, STATE OF ALASKA

* * *

any of the funds, since, by its own admission, it chose not to apply for funds from the program in FY 86. Thus, the maximum amount that the appellants could claim from the undistributed funds, should they ultimately succeed on the merits, is \$611. The state agrees to withhold this amount to satisfy appellants.²

VI

CONCLUSION

The trial court did not abuse its discretion when it denied the stay pending appeal. There is no necessity for a continuing injunction to protect the appellants. The trial court had no jurisdiction to hear the case because it concerned only state law. Finally, we offer to withhold from the disbursement the total amount to which the appellants would be en-

* * *

² In the District Court, we withheld \$29,939 from FY 86 funds, because that was the amount needed to satisfy the claims of all similar villages should they succeed on the merits. At that time the case was filed as a class action. The motion for class action certification was denied. (CR 16, 17). Thus, the only claimants before this court are Noatak and Circle. We made clear before the District court that if the plaintiffs succeeded on the merits, the state would treat all similarly situated villages alike; we still would do so. But to accomplish this does not require withholding appropriated funds from other communities, it merely requires funding by the legislature like any other judgment.

No. 89-1782

JUL 17 1990

In The
Supreme Court of the United States
October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL J. WALLER
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122 First Ave.
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*Attorney for Respondent and
Counsel of Record*

QUESTIONS PRESENTED

1) Does State action to deny benefits provided under state law to a government based upon the racial character of the citizens of that government raise a federal law question for the purposes of invoking federal court jurisdiction?

2) May Congress extend recognition to an Indian tribe?

3) May an Indian tribe bring suit against a State in its own right where the Federal government could have brought suit to protect the tribe's rights?

LIST OF PARTIES

PETITIONER:

David Hoffman, Commissioner, Department of Community and Regional Affairs, State of Alaska

RESPONDENTS:

Circle Village
Native Village of Noatak

OTHER PLAINTIFFS IN THE PROCEEDINGS BELOW:

Native Village of Akiachak

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No. 89-1782

In The
Supreme Court of the United States
October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
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STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Circle Village respectfully requests the Court to deny the petition for a writ of certiorari seeking review of the Ninth Circuit's decision in *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir., 1990) for the reasons stated herein.

STATEMENT OF THE CASE

The Native village of Circle is a small Athabascan Indian village located on the left bank of the Yukon River 130 miles Northeast of Fairbanks at the end of the Steese Highway. Contrary to the Petitioner's claims, Circle was the "retirement" village of the last great paramount chief of the G'within Athabascan Indians, She-na-tee. She-na-tee was a powerful trade chief, and consequently, non-Native traders established a trading post at the site in the late 1800's. While there is some disagreement between Native and non-Native history of the Village's origin, there is no dispute that until his death, river steamers would sound their horns in tribute to She-na-tee when they passed by Circle.

Today the village has a population of about 80 persons, of whom 60 are tribal members. Approximately 2/3 of the tribal members reside in Circle. The non-Native population is primarily composed of school personnel, traders, and utility operators.

The village is governed by a traditional Native village council elected by the tribal membership. The tribe has sought reorganization of its government under the terms of the Indian Reorganization Act [25 USC § 476] (IRA) and is expected to hold an election on the issue this fall, however, at the time this case arose, the village was still operating under its interim provisional constitution. While the village does not have a reservation, the vast majority of individually owned land in the village is made up of Native allotments or Native townsite lots, the title to which are restricted by the United States government. The tribal government operates a health clinic,

community center, and a variety of other services either directly or through a consortium tribal agency in cooperation with surrounding tribes. The village was recognized in the Alaska Native Claims Settlement Act [43 USC §§ 1601-1628] (ANCSA) and operates a village profit corporation which holds title to the tribe's land and cash settlement under the terms of that Act.

For a number of years, the State of Alaska has operated a state revenue sharing program. Under the program, the State has provided financial assistance to local governments. The program provides general assistance funds as well as designated funds for specified purposes to municipal governments in Alaska.

In 1980, the Alaska legislature enacted an amendment to the State revenue sharing program providing general assistance to "Native Village governments" A.S. 29.89.050. The statute defined the term "Native village government" to only include governments organized under the terms of the IRA and traditional village councils, or paramount chiefs for villages recognized under ANCSA. In 1981, the Attorney General for the State of Alaska issued an opinion which declared the State statute unconstitutional based upon the fact that "Native village governments" were racially defined organizations and that state support for such organizations was violative of both the State and Federal constitutions. Rather than closing out the program altogether, the opinion suggested that the statute could be rewritten by administrative interpretation to be constitutional by expanding the class of beneficiaries to include service organizations for non-Native communities not otherwise receiving benefits

under the State revenue sharing program. Based upon this opinion, the petitioner did exactly that.

In 1982, the petitioner redirected the funds for Circle to a non-profit corporation organized and controlled by the non-Native population of Circle (approximately 20% of the village residents). In 1984, after some protest, the petitioner split the funds for Circle: 50% going to the Native Village Council (representing 80% of the village) and 50% going to the non-profit organized and controlled by the non-Native residents of Circle. At trial the tribe is prepared to affirmatively demonstrate that the hearing officer for the petitioner was motivated by racial contempt for the ability of the Natives to administer state funds.

In 1985, the Legislature amended the statute to be consistent with the A.G.'s opinion based upon the legal advice of the A.G. that the prior enactment was unconstitutional. In that year, Circle as well as the village of Noatak brought suit in Federal District Court challenging petitioner's action as violative of federal anti-discrimination laws and other federal laws and policies intended to promote tribal self-government. The District Court dismissed the matter, finding the absence of a federal question. The District Court, while not reaching the issues, suggested that neither village was an Indian tribe under federal law, and that the Eleventh Amendment would be a bar to the action.

On appeal to the Ninth Circuit, the Court held that (1) both Circle and Noatak are Indian tribes for the purposes of 28 UCS § 1362 (providing for federal court jurisdiction over matters brought by an Indian tribe); (2)

that the sovereign immunity of the state of Alaska does not bar the instant action, and (3) that alternative basis of federal court jurisdiction existed in the allegations that the Petitioner's actions violated federal anti-discrimination laws and other federal laws and policies intended to promote tribal self-government.

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly ruled that Congress may recognize Indian tribes and has done so with regards to the Native Village of Circle. The well established principles of federal Indian law direct that Congress has plenary authority over the affairs of Indians, which include the power to extend political recognition to Indian tribes. Such actions are political actions not usually subject to judicial review or at least entitled to great deference. Congress has extended such recognition to Circle under ANCSA and other statutes.

Additionally, the Court's ruling respecting the State's sovereign immunity is equally well grounded upon the rulings of this Court. The State's immunity does not extend to bar a suit by the federal government, and equally does not bar a tribe when the tribe brings suit on a claim for which the federal government could have brought the claim.

Finally, there can be no serious argument that racial discrimination states a federal cause of action. Recent decisions by this Court hold that questions of mixed federal and state law questions regarding federal Indian law state a federal cause of action.

The Petitioner grossly overstates the impact of the decision from a national perspective. The case does not open avenues of litigation against States by Indian tribes which did not exist before. In fact, as this Court is very much aware, litigation between Indian tribes and states is very common. Although, the decision clarifies tribal status of Alaskan tribes, it does not either change established rules governing recognition of tribes and at most only applies to tribes in Alaska. Consequently, Circle Village respectfully requests the Court to deny the petition.

I. THE COURT OF APPEALS DECISION WITH RESPECT TO TRIBAL STATUS IS CONSISTENT WITH WELL ESTABLISHED PRECEDENCE.

With regards to Circle, the Court of Appeals held that Circle is a federally recognized Indian tribe given the fact that Congress has recognized Circle's status in the Alaska Native Claims Settlement Act [43 USC § 1610(b)(1)], the Indian Self-Determination Act [25 USC § 450b(e)]; the Indian Financing Act [25 USC § 1452(c)]; and the Indian Child Welfare Act [25 USC § 1903(8)].

A tribe may exist in a de facto sense and have a legal existence independent of federal recognition. *Menominee Tribe v. United States*, 391 US 404 (1968). However, federal recognition is indicative of an ongoing government to government relationship between the tribe and the federal government and confers upon the tribe certain rights and privileges unique to tribal status. *id.* The long established rule of this Court has been that Congress has plenary authority over Indian affairs, *Worcester v. Georgia*,

31 US 515 (1832), and that this power extends to the province of recognition of tribal existence. *Montoya v. United States*, 180 US 261 (1901).

According to *Montoya* tribal recognition is not a wooden standard. A tribe is a body of Indians of the same race, united in a community under one leadership or government and inhabiting a particular territory. Generally, a pattern of Congressional and Executive action which recognizes this political relationship has been sufficient for the Courts to determine that Congress or the Executive branch has extended recognition to a particular tribe. *United States v. Sandoval*, 231 US 28 (1913). Recognition of a tribe by the federal government is a political act which is not generally subject to judicial review. *United States v. Rickert*, 188 US 432, 445 (1903); *Baker v. Carr*, 369 US 186 (1962). However, the Court has expressed a limit to Congress' power to define tribal status suggesting that this power may not be exercised in an arbitrary manner. *United States v. Sandoval*, *supra*, at 46; See COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, 5 (1982 ed.)

The Court of Appeals decision does not depart from these principles, but rather applies them to the uncontested facts of the case. There is no dispute that Congress has dealt with Circle as an Indian tribe in the statutes cited by the Circuit Court.

The Petitioner does not dispute that Circle is a community of Native people living in common association indicative of a tribe in a defacto sense nor does petitioner deny that Congress has dealt with Circle as an Indian tribe. Rather, petitioners express grave doubts as to

whether the tribe is recognized by the federal government within the meaning of 28 USC § 1362 based on two Ninth Circuit cases: *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985) and *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988). The Court of Appeals, however, correctly distinguished these decisions from this case.

In *Price*, the Court was faced with a situation where the Federal government had not extended any form of recognition, including the opportunity to organize under the IRA. As the Court noted, *Price* left open the question as to whether organization under a federal statute as a tribe was sufficient evidence of tribal status. *Price* does not stand for the notion that such organization standing alone is insufficient evidence of tribal status as suggested by petitioners. The case of Native Hawaiians is substantially different than Native Alaskans. As the Circuit Court noted, Circle was the subject of a settlement of aboriginal land claims in ANCSA. Only tribes may assert such claims. See *Oneida Indian Nation v. County of Oneida*, 414 US 661 (1974). The comparison of the two cases is simply a comparison of apples and oranges.

In *Venetie*, the Court was faced with uncertainty concerning the structure of the Native villages involved. *id.*, at 1387. There is no such similar confusion in the present case.

Neither *Venetie* nor *Price* hold that a judicial factual inquiry is required to determine tribal status in the face of a clear pattern of Congressional recognition and in the absence of uncertainty regarding the particular tribal

structure involved. To suggest otherwise as argued by petitioners deviates from established precedence.

II. THE CIRCUIT COURT'S DECISION RESPECTING THE STATE'S SOVEREIGN IMMUNITY CLOSELY FOLLOWS THE DECISION OF THIS COURT.

The Circuit Court held that the Eleventh Amendment does not bar suits by Indian tribes against states when the suit is brought under 28 USC § 1362, which is to say, where an Indian tribe is bringing suit upon a claim which might be brought by the federal government on behalf of the tribe. The Petitioner suggests a much broader interpretation of the case in an effort to secure this Court's review. Petitioner's claim that the Circuit Court's analysis broadly waives the State's Eleventh Amendment protection and may give rise to suits in admiralty and interstate commerce. If such were the case, the Petitioner would likely be correct in seeking review. However, the holding of the Circuit Court is much narrower than the extreme argument suggested by Petitioner and is on point with the holdings of this Court.

As the Circuit Court noted, this case involves an Indian tribe. Indian tribes occupy a unique niche in the fabric and history of American jurisprudence. As noted by the Court, the legal characterization of Indian tribes by this court has been a difficult and unique problem. As noted in *Cherokee Nation v. Georgia*, 30 US (5 Pet.) 1 (1831), Indian tribes are neither considered to be individual citizens, nor states of the Union, nor foreign states. Rather they are unique dependent states subject to the sovereignty of the United States, yet possessing the attributes

of a dependent sovereignty. As such they are independent of the sovereignty of the States in which they are found, being subject only to the plenary power of Congress to regulate commerce with them. *Worcester v. Georgia*, 31 US (6 Pet.) 515 (1832).

The Circuit Court's analysis is premised upon this unique legal niche occupied by Indian tribes and reflects a balance of tension necessarily experienced between the Constitutionally protected sovereignty of the States contained in the Eleventh Amendment and the plenary power of Congress over Indian affairs. Article 1, Section 8, U.S. CONST. This Court has often dealt with that tension, and provided guidance to the Circuits. In this case, the Circuit Court has closely followed the holding of this Court in *Moe v. Confederated Salish & Kootenai Tribes*, 425 US 463 (1976) which held that a statutory bar to suit against a state did not bar a suit against a tribe where the tribe brought a claim which could have been brought by the federal government on behalf of the tribe. Since the holding in *Moe*, the Courts have applied this logic to Eleventh Amendment cases. *Oneida Indian Nation v. New York*, 691 F.2d 1070 (2d Cir. 1982).

Contrary to the characterization suggested by Petitioner, the Circuit Court's holding does not rest upon the proposition that the State waived its immunity to a wide variety of suits upon entry into the Union. Rather, the logic of the opinion rests upon the unquestioned maxim of law that the State surrendered its authority over Indian affairs to the plenary power of Congress upon entry into the Union. The Petitioner suggests that the Circuit Court's opinion "turns the real balance of federalism upside down" (Petition at 11). On the contrary, as the

Circuit Court noted, the balance was struck in 1789 in favor of Congress's plenary power over Indian affairs in derogation of any such power which may be asserted by the various states. *Native Village of Noatak v. Hoffman*, *supra*, at 1501.

The case represents a narrow holding respecting suits brought by Indian tribes under 28 USC § 1362 and follows closely this Court's logic in *Moe*. The suggestions of a broader application are simply in error. The case does not represent a departure from established legal principles and does not warrant this Court's review on this issue.

III. RACIAL DISCRIMINATION AND THE STATUS OF AN INDIAN TRIBE RAISE FEDERAL QUESTIONS.

The tribe alleged racial discrimination and a failure to accord a legal status to the tribe derived from federal law as the cause of action. The Circuit Court found that both allegations raised a federal question

With regard to the discrimination claim, Petitioners argue that no discrimination could have occurred because the State was attempting to avoid discrimination by treating similarly situated communities alike. While the argument may be clever, it masks discrimination which is designed to strip a people of their legal rights based upon the group's racial characterization. The fundamental point in this case is that Indian tribes are political entities, not racial clubs. *Morton v. Mancari*, 417 US 535 (1974). The attempt to deny or reduce benefits by incorrectly characterizing the tribe based upon the racial character of its

membership is racially based discrimination. The claim that racial discrimination occurred clearly raises a federal question. *Washington v. Seattle School Dist. No.1*, 458 US 457 (1982).

Moreover the question of the tribe's status under federal law is clearly a federal law issue. While the benefit arose out of state law, the benefit was premised upon the tribe's status under federal law. The issue, therefore, is truly a question of mixed federal and state law. In *Three Affiliated Tribes v. Wold Engineering*, 467 US 138, 157 (1984) this Court considered the question as to the validity of a state statute which required a tribe to waive its sovereign immunity as a precondition to access to state courts. In *Wold*, the Court noted that in the situation where a state law interpretation rests upon an incorrect perception of federal law, a federal question is raised. The issue is the same in this case. The Petitioner's understanding of the status of the tribe is a question of federal law, which has been incorrectly perceived by the Petitioner. Under *Wold* it is clear that a federal question arises because in this case it is alleged that the State action rests upon an incorrect understanding of the underlying federal law. This case is not a matter of pure state law, as claimed by Petitioner. Rather, the legal characterization of the tribal status is purely a matter of federal law. Consequently, the case raises a federal question.

IV. THE PETITIONER OVERSTATES THE IMPACT OF THE DECISION.

Petitioner argues that the case represents a substantial invasion of the State's Eleventh Amendment protections and changes the rules respecting the determinations

of tribal status in America. These are obvious overstatements of the impacts of this decision.

As to the Eleventh Amendment, the case only applies to suits brought by Indian tribes, which have traditionally been allowed in the federal courts, *supra*. As to the question of tribal status, this case applies to the tribes of Alaska governed by ANCSA. Further it follows the common rules respecting tribal recognition in the other states. In neither case, has the Circuit Court expanded upon prior decisions.

CONCLUSION

The Circuit Court correctly decided the case below and the opinion does not present substantial issues of federal law. The Native Village of Circle, therefore, respectfully requests that the Court deny the petition.

Respectfully submitted,

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July 16, 1990

APPENDIX A
PRINCIPAL CONSTITUTIONAL PROVISIONS
AND STATUTES

Article I, Section 8, Clause 3 of the United States Constitution states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

The Eleventh Amendment to the United States Constitution states:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602(c)) states:

28 U.S.C. § 1362 states:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

A.S. 29.89.050. State aid to Native village governments. The state shall pay \$25,000 to a Native village government for a village which is not incorporated as a city under this title. In this section, "Native village government" means

(1) a local governing body organized by authority of the Act of congress of 25 U.S.C. 476 (the Act of Congress of June 18, 1934)

(2) a traditional village council or, if there is no traditional village council, the paramount chief or other governing body of a Native village, which meets the requirements of 43 U.S.C. 1601-1628 (Alaska Native Claims Settlement Act). (§ 3 ch 155 SLA 1980)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

Supreme Court, U.S.

FILED

SEP 18 1990

JOSEPH F. SPANIOLO, JR.
CLERK

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF
COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,
Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals -
For The Ninth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

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September 18, 1990

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1990

No. 89-1782

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF
 COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,
Respondents.

**On Petition For A Writ of Certiorari
 To The United States Court Of Appeals
 For The Ninth Circuit**

**SUPPLEMENTAL BRIEF IN OPPOSITION
 TO PETITION FOR WRIT OF CERTIORARI**

**I. THE STATE NOW ADMITS THAT RESPONDENT NA-
 TIVE VILLAGE OF NOATAK HAS TRIBAL STATUS AND
 THEREFORE THE RIGHT TO SUE IN FEDERAL COURT
 UNDER 28 U.S.C. § 1362**

In our brief in opposition to the petition for a writ of certiorari, we pointed out that the position of Alaska's judicial and executive branches on the question of tribal status was in the midst of a period of rapid transition, thus making review premature and inappropriate in this case. Brief in Opposition at 8. The

latest shift in the State's position underscores this point.

On September 10, 1990, the Governor of Alaska issued an Administrative Order treating as tribes those Alaska Native Villages which could meet federal criteria for tribal recognition. The order is attached as Appendix A. The attachment to the order also provides that all such tribes "would almost certainly have . . . the right to sue in federal court." Attachment to order, Appendix A at 4a. (In its petition for certiorari, the State had acknowledged "that . . . Noatak probably could meet [such federal recognition] . . . criteria".) Pet. at 4 n.4.

Thus, the State executive branch has now effectively agreed that Noatak has tribal status and the right to bring suit in federal court under 28 U.S.C. § 1362 and has thereby implicitly withdrawn, or rendered moot, the second question presented for review. The State's belated but welcome admission as to the correctness of the Ninth Circuit's decision on the issue of tribal status is likewise the view of the United States. See Brief of the United States as Amicus Curiae filed in August 1990 in *Puckett v. Tyonek*, U.S. Supreme Court Case No. 89-609.

II. THE STATE'S RECENT ADMISSION THAT NATIVE VILLAGES HAVE TRIBAL STATUS IS FURTHER GROUND FOR DENYING CERTIORARI ON THE THIRD QUESTION PRESENTED, i.e., THE SUBSTANTIALITY OF THE FEDERAL CLAIMS

The State conceded in its petition that the question as to the substantiality of the federal claims does not satisfy the certiorari criteria of this Court's Rule 17. Pet. at 16 n. 16. In any event these claims will be tested on remand to the district court should the State

elect to seek dismissal for failure to state a claim upon which relief can be granted.

The Governor's recent agreement to treat Native Villages as tribes, however, presents an additional ground for denying certiorari on the question of substantiality. By his administrative order, the Governor has implicitly overruled the earlier Attorney General's opinions concluding that Native Villages were not tribes but racial entities and therefore State aid to Native Councils under the State Revenue Sharing Act (Alaska Statute § 29.89.050) was discriminatory and unconstitutional (Pet. at 2). These earlier opinions formed the basis of the Petitioner's administrative revision of this Act, which in turn became the subject of the Villages complaint herein.

The Governor's administrative order implies that there was no constitutional basis for the petitioner's administrative revision of the State Revenue Sharing Act in the first instance, making it highly unlikely that similar actions will be taken in the future, thus eliminating the necessity for review.

CONCLUSION

For the foregoing reasons, and those previously presented, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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September 18, 1990

APPENDIX

APPENDIX A

**STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU**

MEMORANDUM

TO: All Commissioners DATE: September 10, 1990
FROM: Steve Cowper SUBJECT: Administrative
Governor Order No. 123 Re:
State's Tribal
Status Policy

Attached for your information is Administrative Order Number 123 establishing the State's Tribal Status Policy. The State of Alaska has been informally operating under this policy and this Administrative Order formally implements it. Please forward copies of this order to the appropriate divisions in your department and to the directors of your regional office.

If you have any questions on this Administrative Order, please contact my Special Staff Assistant, Mike Irwin, at 465-3500.

cc: Governor's Regional Offices
Special Staff Assistants
Native Policy Committee

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

ADMINISTRATIVE ORDER NO. 123

I, Steve Cowper, Governor of the State of Alaska, under the authority granted by Article III of the Alaska constitution and by Alaska Statute 44.17.060, hereby establish the Policy of the State of Alaska on Existence of Tribes in Alaska.

In order to clarify the State's position and to insure that Alaskan Natives receive the recognition to which they are entitled, the State adopts the following policy on recognition of tribes in Alaska.

Tribes exist in Alaska. The State believes that Native Alaskan tribes exist within Alaska, both on our only federally recognized reservation (the Metlakatla Indian Community on Annette Island), and in other communities. We contend that many Native Alaskan groups could qualify for tribal recognition under federal law, although some would not. The State realizes that the existing federal tribal acknowledgement process is complex and time-consuming, and in many instances is not well suited for use by Alaskan Native tribes. We think that it would be unfair and overly legalistic for the state to treat as tribes only those Native groups that have actually gone through the detailed and complicated federal recognition process. The State believes that it should treat as a tribe any Alaskan Native group that could qualify, even if it has not actually gone through the formal process. The State will treat as a tribe any Alaskan Native group that meets the common sense of the word. For example, we believe that the Native residents of a majority of communities listed as a Native village in the Alaska Native Claims Settlement Act (ANCSA) should be considered a tribe. Although some Native organizations are not tribes—it would be contrary to the

intent of Congress, for example, to treat ANCSA corporations as tribes—we believe Native groups should be accorded the dignity of being treated as tribes whenever possible.

The powers of Alaskan Native tribes. All tribes have some powers, whether they occupy reservations or not. The extent of the powers of off-reservation tribes is not fully defined in the law, but it includes the right to define the tribe's own membership and to regulate its own purely internal affairs. A tribe will also have any powers expressly granted to it by the federal government, such as in the Indian Child Welfare Act, whether or not it occupies a reservation.

The State also believes that certain powers belong only to tribes that occupy reservations. For example, outside of a reservation, a tribe may not exclude non-members or regulate their affairs, or regulate resources that belong to all Alaskans, such as fish and game, or give its members immunity from state laws. When the state treats a Native group outside of a reservation as a tribe, it does not recognize that the tribe has the governmental powers of a tribe on a reservation. Whether governmental powers exist in a tribe in any particular instance is a completely separate question from tribal status.

This order takes effect on the 10th, day of September, 1990.

DATED at Juneau, Alaska, this 10th day of September, 1990.

/s/ Steve Cowper
Steve Cowper
Governor

Attachment to
Administrative Order No. 123

PROBABLE POWERS OF AN
OFF-RESERVATION TRIBE

Each tribe would almost certainly have these powers:

- the power to define its own membership
- the power to control its own internal affairs [It is unclear what this category entails, but it probably includes selection of its own officers and control of its own finances]
- the right to sue in federal court
- sovereign immunity as to some matters, e.g., those directly affecting purely tribal matters [Note that the Alaska Supreme Court may disagree since it has tied sovereign immunity to sovereign powers of a government]

An off-reservation tribe almost certainly would not have the following powers in the absence of a reservation or other area defined as Indian country.

- authority to exclude non-members
- authority to condemn property
- authority to manage wildlife, including hunting and fishing
- regulatory authority over non-members without their consent
- judicial authority over non-members without their consent
- taxation authority over non-members without their consent
- immunity from state laws

There is a sizeable grey area, in which an off-reservation tribe may have an argument for its own authority, but where we believe the better legal view is that they lack the power outside of Indian country:

- judicial authority, including criminal misdemeanor authority, over their own members
- authority to tax their own members
- authority over domestic relations (marriage, divorce, child custody); in addition to authority already granted by Congress over children's matters in the Indian Child Welfare Act
- sovereign immunity for some matters, such as torts committed away from the community and contracts entered into for business or proprietary reasons

This listing of powers does not reflect where federal law may delegate powers in the absence of Indian country, such as in the Indian Child Welfare Act and in the federal Indian liquor laws. It is still possible for Congress to grant or clarify off-reservation tribal powers in the future, for example, affirmatively permitting tribal judicial authority over misdemeanors by members.

This listing also does not reflect possible policy preferences by the state. For example, the state could choose not to contest—or could even advocate in Congress—expanding the Indian liquor laws or tribal authority over member misdemeanants, or exercise of some governmental powers by tribes over their own members, such as taxation, judicial authority, or education.

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No. 89-1782

In The
Supreme Court of the United States

October Term, 1989

DAVID HOFFMAN, COMMISSIONER,
DEPARTMENT OF COMMUNITY AND REGIONAL
AFFAIRS, STATE OF ALASKA

Petitioner,

v.

NATIVE VILLAGE OF NOATAK, et al

Respondents.

BRIEF OF AMICI, THE STATES OF

| | | |
|-------------|------------|----------------|
| Alabama | Hawaii | North Dakota |
| Arizona | Louisiana | Pennsylvania |
| Colorado | Michigan | South Carolina |
| Connecticut | Minnesota | Washington |
| Idaho | Montana | Wisconsin |
| Florida | Nevada | Wyoming |
| | New Mexico | |

**IN SUPPORT OF ALASKA'S PETITION FOR A
WRIT OF CERTIORARI TO THE NINTH CIRCUIT
COURT OF APPEALS**

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QUESTIONS PRESENTED

1. In light of the text of Article III which does not provide for suit by Indian tribes and the adoption of the Eleventh Amendment, can Indian tribes sue the states in federal court where there has been no Congressional action abrogating the states' sovereign immunity?
2. Is there a federal question presented when a state statute providing state benefits to unincorporated communities with native village governments is interpreted, by force of the state constitution, to make the state benefits available to all unincorporated communities?*

*This Amici brief will not address the second question raised in the petition for the writ of certiorari whether an Indian group is a tribe for purposes of 28 U.S.C. § 1362. Amicus curiae, the state of Connecticut, believes that this question raises significant issues of Indian law and urges that certiorari be granted on this question.

INTEREST OF THE STATES AS AMICI CURIAE

In this case, the Court of Appeals for the Ninth Circuit concluded that the states in consenting to the Constitution have consented to being sued by Indian tribes in federal court.^{1/} The Amici states now, as at the time of consenting to the Constitution, are vitally interested in maintaining their sovereign immunity from suit in federal courts.

By holding that state sovereign immunity, as manifested by the Eleventh Amendment, is inapplicable to suits by Indian tribes, the decision below subjects each of the states in the Ninth Circuit to suits by Indian tribes from which the states believed they were

1. Native Village of Noatak v. Hoffman, 896 F.2d 1157, 1165 (9th Cir. 1990).

immune. Moreover, the states in the Eighth Circuit continue to enjoy immunity from the same kind of suits now permitted in the Ninth Circuit because the Court of Appeals for the Eighth Circuit held that the Eleventh Amendment precludes Indian tribes from bringing suit against states in federal court. Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1974). Thus, the decision below creates a conflict among the circuits and uncertainty as to the status of the states' immunity in those circuits where the question has not been decided.^{2/}

2. The uncertainty in other circuits is illustrated by an ongoing case involving Wisconsin, one of the Amici states. In Lac Courte Oreilles Band, Etc. v. State of Wis., 595 F. Supp. 1077 (W.D. Wis. 1984), the district court held that 28 U.S.C. § 1362 abrogates the eleventh amendment. Id. at 1081. (Cont'd)

Additionally, the Ninth Circuit's analysis, which contradicts the intent, rationale and holdings of this Court's decisions construing the reach of the Eleventh Amendment, may be utilized in analogous cases to allow further encroachment upon the states' sovereign immunity.

(footnote 2 Cont'd) Unquestionably, however, as expressly recognized by the Ninth Circuit's decision here, the now controlling decisions of this Court disapprove the reasoning underlying the Eleventh Amendment abrogation holding in Lac Courte Oreilles, 595 F. Supp 1077. Moreover, the sovereign immunity issue remains for resolution because this Wisconsin case is continuing: the plaintiff Indian bands seek damages for alleged past treaty violations in the yet to be tried Phase III of Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis., No. 74-C-313-C (W.D. Wis. filed Sept. 4, 1974). Hence, a ruling from this Court on whether 28 U.S.C. § 1362 abrogates a state's eleventh amendment sovereign immunity is critical.

The Court of Appeals for the Ninth Circuit also decided that a substantial federal question was presented by the claim that Alaska violated the federal equal protection clause when it changed, by force of its own constitution, its original revenue-sharing program which favored the Indians over other citizens to a program which treated them the same as other citizens. This decision affects each of the States in the Ninth Circuit directly as their entitlement programs must now be carefully monitored to avoid running afoul of the Court of Appeals holding. Moreover, this decision is likely to have a chilling effect in the Ninth Circuit and other circuits as states will hesitate to favor those especially in need with benefits for fear

that any change in the original program may subject them to liability.^{3/}

SUMMARY OF ARGUMENT

A. The Court of Appeals decision openly defies this Court's sixty-four year old precedent established in United States v. Minnesota, 270 U.S. 181 (1926), by declaring it mere dictum. Moreover, despite this Court's recent, repeated and clear pronouncements that although

3. The Amici states believe that although the grant of certiorari on the Eleventh Amendment question would likely result in the opinion below being vacated, the Court of Appeals' opinion that a federal question was presented by the complaint in this case may remain precedent in the Ninth Circuit. See United States v. Alcantar, 897 F.2d 436 (9th Cir. 1990)(citing Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1988, vacated as moot, 109 S.Ct. 1736 (1989)). Accordingly, certiorari should be granted on that question as well.

Congress can, under its Commerce Clause powers, abrogate a state's sovereign immunity, such abrogation must be found in unmistakable language in the Congressional enactment itself, the Court of Appeals holds that such abrogation was unnecessary since the states have consented to suits by Indian tribes when the Constitution was adopted. Such a breathtaking holding short-circuits the essence of federalism--state's participation in Congressional debates and law-making. Lastly, certiorari should be granted because there is now a clear conflict among the circuits on whether state sovereign immunity bars suits by Indian tribes against a state.

B. Under the principles announced by this Court in Crawford v. Los Angeles Board of Education, 458 U.S. 527 (1982),

a state constitutional provision that addresses, in neutral fashion, a race-related matter, and which merely repeals or modifies race-related legislation or policies that were not required by the Federal Constitution does not violate the Federal equal protection clause. The Court of Appeals' opinion holding that Alaska is barred from also distributing, under its constitution's equal protection and public purposes clauses, legislative grants of monies to other unincorporated communities without Native Village governments, flies in the face of the Crawford decision. The Court of Appeals' decision would freeze in place all state benefit programs which favor racial minorities with the attendant undesirable result that states would be deterred from first enacting such programs.

ARGUMENT

I. THIS CASE PRESENTS THE IMPORTANT CONSTITUTIONAL QUESTION WHETHER INDIAN TRIBES MAY SUE THE STATES WITHOUT ANY CONGRESSIONAL ACTION ABROGATING THE STATES' SOVEREIGN IMMUNITY.

A. The Court Of Appeals Disregarded This Court's Opinion in United States v. Minnesota and the Rationale Governing This Court's Decisions Concerning the Eleventh Amendment.

In United States v. Minnesota, 270 U.S. 181 (1926), this Court determined that the federal government was not barred by the Eleventh Amendment from suing Minnesota in federal court on behalf of the Chippewa Indians. The Court's decision and analysis in United States v. Minnesota was premised on its conclusion that the Indian tribe could not bring suit directly against Minnesota.

The reason the Indians could not bring the suits suggested lies in the general immunity of the state and the United States from suit in the absence of consent.

270 U.S. 181, 195.

The Court of Appeals' characterization of the above-quoted language as dictum is incorrect. That language is "necessary for and integral to"^{4/} the Court's expressly stated conclusion that although the Indians were the real parties in interest, the United States had a duty to act on their behalf and that such an action by the United States did not infringe on state sovereign immunity.

Moreover, the Court's language in Minnesota has remained unchallenged and has not been overruled or disapproved for sixty-four years. It has been cited as an authority as recently as 1983. See, Arizona v. California, 460 U.S. 605, 614 (1983). The Court of Appeals cited no intervening decision nor any other

^{4/} California v. Federal Energy Regulatory Commission, 58 U.S.L.W. 4591 (U.S. May 22, 1990).

authority to justify the departure from such a long-standing rule. In light of Congress' plenary power to abrogate state sovereign immunity, the effect of stare decisis has special force, "for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." Patterson v. McLean Credit Union, 109 S.Ct. 2363, 2370 (1989).

The Court's conclusion in United States v. Minnesota that state sovereign immunity applies to suits against states brought by Indian tribes is consistent with the Court's interpretation of the Eleventh Amendment in Hans v. Louisiana, 134 U.S. 1 (1890); Smith v. Reeves, 178 U.S. 436 (1900); and Monaco v. Mississippi, 292 U.S. 313 (1934).

In Hans v. Louisiana, the Court held

that the Eleventh Amendment barred suit by an individual against his state. The Court acknowledged that the literal language of the Eleventh Amendment did not provide for such immunity but concluded, nonetheless, that it was the intent of the framers of the Constitution and the purpose of the Eleventh Amendment to protect the sovereignty of the state.

The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens

in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

. . . The suability of a state without consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.

. . . "It may be accepted as a point of departure unquestioned", said Mr. Justice Miller, in Cunningham v. Macon & B.R. Co., 109 U.S. 446, 451, "that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this Court by the Constitution."

134 U.S. at 15-17 (emphasis added).

The Court extended its broad interpretation of the Eleventh Amendment to also preclude suit by a corporation against a state, in Smith v. Reeves,^{5/}

5. 178 U.S. at 447-48.

quoting the above language from Hans v. Louisiana.

Finally, in Monaco v. Mississippi, the Court determined that the Eleventh Amendment protected the states from suit by a foreign state:

The "entire judicial power granted by the Constitution" does not embrace authority to entertain such suits in the absence of the State's consent. [citations omitted]

292 U.S. at 329.

The Court's recent cases addressing the Eleventh Amendment have not retreated from the principals set forth in Hans, Reeves and Monaco. The Court expressly declined to overrule Hans in Dellmuth v. Muth^{6/} and has consistently held that it will recognize abrogation

6. 109 S.Ct. 2397, 2401 n.2 (1989)

of the States' Eleventh Amendment immunity only where Congress has made its intention "unmistakably clear in the language of the statute." Id. at 2400, quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); Pennsylvania v. Union Gas Co., 109 S.Ct. 2272, 2277 (1989); and Hoffman v. Conn. Dept. of Income Maintenance, 109 S.Ct. 2818, 2822 (1989).

Despite the clear directives from this Court and the Ninth Circuit's own explicit finding that "the statute conferring jurisdiction of suits brought by tribes [28 U.S.C. § 1362] does not unmistakably, unequivocally and textually abrogate the state's immunity. . . ", the Court of Appeals concluded there was no sovereign immunity. It did so based upon a wholly unprecedented concept that the states consented to suit by Indians upon

consenting to the Constitution. 896 F.2d at 1162. The Court of Appeals' rationale and holding is contrary to the decisions of this Court. Because the resolution of this question affects all the states as well as the Indian tribes, the Court should grant the petition for writ of certiorari.

B. The Court of Appeals' Finding that the States "Consented" to Being Sued by the Indians by Consenting to the Constitution Is Contrary to the Text and History of the Constitution and the Spirit and Purpose of the Eleventh Amendment as Construed By This Court.

The Court of Appeals starts with the proposition that a proper reading of the Eleventh Amendment is a "reading consistent with the principles of federalism that inform the amendment." 896 F.2d at 1162. The Amici states have no argument with this general principle; however, the Court of Appeals' conception of these

principles of federalism is vastly different from this Court's view of them. The principles of federalism underlying the Eleventh Amendment as set forth in this Court's decisions mandate the conclusion that the Eleventh Amendment applies to Indian tribes.

Simply stated, the Court of Appeals reasoned that because Indian tribes were present in and about the states at the time the Union was formed and because the federal government was given power by the States to maintain peace with the tribes by entering into treaties and also given exclusive power over Indian affairs, even as to Indians within a state, the States consented to federal jurisdiction over Indian affairs. 896 F.2d at 1162-63. The Court of Appeals rationale cannot withstand analysis.

First, when the states consented to the Constitution, the states consented to the federal judicial power under Article III of the Constitution. Plainly, Article III on its face does not provide for the exercise of federal judicial power in a suit by an Indian tribe against a state. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831) explains:

At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. This was well understood by the statesmen who framed the Constitution of the United States and might furnish some reason for omitting to enumerate them among the parties who might sue in the Courts of the Union. (Emphasis added).

The States also consented to the Commerce Clause including Congressional power to regulate Indian commerce. However, neither the Commerce Clause nor

the Indian Commerce Clause creates or governs federal judicial power under Article III. Therefore, consent to Congressional regulation of Indian Commerce cannot be construed to be consent to federal judicial power which may give rise to a lawsuit by an Indian tribe against a state. Both the adoption of the Eleventh Amendment after the Constitution was adopted and this Court's decision in Hans v. Louisiana reinforce the concept that the states cannot be sued without their consent.

Undeniably, Congress, under Article III's federal question jurisdiction, may permit Indian tribes to bring federal question lawsuits in the federal courts. After this Court's decision in Pennsylvania v. Union Gas Co., supra, it is also established that Congress may, under the Commerce Clause, abrogate a state's

sovereign immunity inherent in the Eleventh Amendment. However, the Union Gas Co. decision makes it clear that Congress must affirmatively legislate in the statute itself in order to abrogate state sovereign immunity. Therefore, the Court of Appeal's consent theory directly contradicts Union Gas Co. The consent theory would render Congressional action unnecessary. Moreover, the states' consent to Congressional action under the Commerce Clause means that the states understood from the beginning that they will be heard in the halls of Congress prior to the passage of such laws by Congress.

But, the principal and basic limit on the federal commerce power is that inherent in all Congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that

laws that unduly burden the States will not be promulgated.

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 556 (1985). (emphasis added)

The Court of Appeals' consent rationale would short-circuit that political process and render the states' participatory role in Congress, the very heart of federalism, a nullity.

Second, the reasoning of the Court of Appeals that Indian tribes are more like other states and the federal government than like foreign states and individuals is logically nonsensical. The plan of the Union, by which implied and express powers were given to a central government, was by, between, among, for, and on behalf of States. The tribes had no voice in this federal scheme and were quite consciously excluded. The states did not consent to a union of states and tribes nor to governance by the federal

government and the tribes. The absurdity of such a suggestion bears out the fallacy in the Court of Appeals' reasoning.

As the Seventh Circuit Court of Appeals noted:

The Constitution of the United States apportions sovereign power between the United States and the several states, not among the United States, the several states and the Indian tribes.

Wisconsin v. Baker, 698 F.2d 1323, 1332 (7th Cir. 1983).

It requires direct participation in the plan of the union to benefit from the right to sue despite the Eleventh Amendment. In holding that a foreign state is barred by the Eleventh Amendment, the Supreme Court reasoned as follows:

The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a state, which inheres in the acceptance of the Constitutional plan, runs to the other states who have likewise

accepted that plan, and to the United States as the sovereign which the Constitution creates.

Monaco v. Mississippi, supra, 292 U.S. at 330. Thus, a foreign state faces the Eleventh Amendment bar despite the surrender by the states to the federal government of the power to deal with foreign states and despite the absence of foreign states from enumeration in the Eleventh Amendment language. The same rationale inescapably applies to Indian tribes.^{7/}

7. In addition, the Court of Appeals' decision results in an imbalance that is inconsistent with the principles of federalism: tribes can sue states without regard to consent or abrogation, but states cannot sue tribes. A tribe has sovereign immunity. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978). Thus, a state cannot sue a tribe in federal or state courts unless Congress has waived the tribe's sovereign immunity in unequivocal language or the tribe has consented to suit. Id.; Puyallup Tribe v. Dept. of Game of State of Wash., 433 U.S. 165, 172-72 (1977).

C. There Is Conflict Among the Circuits
Whether the Eleventh Amendment
Applies to Indian Tribes.

The decision below is directly contrary to the decision of the Court of Appeals for the Eighth Circuit in Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1974). In that case, the Court of Appeals for the Eighth Circuit held that the Eleventh Amendment precluded an Indian tribe from bringing suit against North Dakota reasoning that "[t]he doctrine of sovereign immunity as embodied in the Eleventh Amendment has been liberally construed to achieve its intended purpose". 505 F.2d at 1138.

Moreover, although the Court of Appeals for the Second Circuit held that

New York was not immune from suit by the Oneida Indian Nation, the rationale for that court's decision was directly opposite to the decision of the Ninth Circuit. Oneida Indian Nation v. State of New York, 691 F.2d 1070, 1079-1080 (2d Cir. 1982). The Second Circuit assumed that the Eleventh Amendment applied to Indian tribes but held that Congress abrogated the states' immunity when it enacted 28 U.S.C. § 1362. As the Court of Appeals for the Ninth Circuit acknowledged, Section 1362 does not meet the requirements of this Court's decisions in Atascadero State Hospital v. Scanlon, 473 U.S. at 238 and Dellmuth v. Muth, 109 S.Ct. at 2400. Thus, although Oneida seems no longer valid, a resolution of this issue would serve also

to clarify the law in the Second Circuit.^{8/}

II. THE COURT OF APPEALS' DECISION HOLDING THAT THE TRIBES CLAIM PRESENTED A COGNIZABLE EQUAL PROTECTION CLAIM CREATES A DANGEROUS PRECEDENT.

The Court of Appeals decided that a federal question was presented by the Indians tribes' claim that the expansion of a revenue sharing program, which benefited only unincorporated communities with native village governments, to

8. Numerous district court decisions have also assumed that the Eleventh Amendment applied to Indian tribes but held that Congress abrogated the immunity when it enacted 28 U.S.C. § 1362. Lac Courte Oreilles Band v. Wisconsin, 595 F. Supp. 1077 (W.D. Wis. 1984); Cayuga Indian Nation of New York v. Cuomo, 565 F.Supp. 1297 (N.D. N.Y. 1983); Charrier v. Bell, 547 F. Supp. 580 (N.D. La. 1982); Confederated Tribes of Colville v. Washington, 446 F.Supp. 1339 (E.D. Wash. 1978), rev'd in part on other grounds, 447 U.S. 134 (1980).

include all unincorporated communities was racially discriminatory and violated the equal protection clause. The Court of Appeals erroneously relied upon Washington v. Seattle School District I, 458 U.S. 757 (1982), which is clearly distinguishable and disregarded Crawford v. Los Angeles Board of Education, 458 U.S. 527 (1982).

The plaintiffs alleged that they were authorized to receive their pro rata share of funds appropriated by the Alaska Legislature in a statute which provided "the state shall pay \$25,000 to a Native Village government for a village which is not incorporated as a city under this title." Alaska Stat. § 29.89.050. The plaintiffs also alleged that the Commissioner of the Department of Community and Regional Affairs (the "Commissioner") decided to expand the class of eligible recipients to include

entities other than the Native Villages solely because of the racial ancestry of individual members of the villages and that this decision violated the federal equal protection clause with the result that plaintiffs' share was diluted.

The Court of Appeals acknowledged that Alaska had no duty to vote a bonus of \$25,000 to each Native Village. Noatak, 896 F.2d at 1165. The Court also acknowledged that the Commissioner's action was based on Alaska's "non-racial" criterion for the distribution of state benefits. Moreover, as the dissent by Judge Kozinski pointed out, Alaska's action was required by its own "equal protection and public purpose" clauses in its Constitution. However, the Court of Appeals determined that to change the original scheme "on the ground that that status had an ethnic origin is itself a

violation of the Constitutional command not to discriminate on the basis of race." Id. To support its conclusion, the Court of Appeals stated:

Any governmental action based on the racial character of those affected is presumptively invalid. Washington v. Seattle School Dist. No. I, 458 U.S. 457, 485 (1982) (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979))

896 F.2d at 1165.

Washington v. Seattle School Dist. does not support the Court of Appeals' conclusion. In Seattle School District, the Court held that an initiative which prohibited school boards from busing students for racial reasons, but permitted the school boards to bus students for virtually every other reason, violated equal protection. The Court cautioned that:

the simple repeal or modification of desegregation or anti-discrimination laws, without more, never has been

viewed as embodying a presumptively invalid racial classification . . .

458 U.S. at 483.

The Court found, however, that:

Initiative 350, however, works something more than the 'mere repeal' of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the state, by lodging decision-making authority at a new and remote level of government.

458 U.S. at 483.

The Court continued:

Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary, to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations.

Id. (Emphasis added)

Thus, the Seattle School District decision was based on the Courts finding that the initiative burdened minority interests and that it was intended to do so.

The Court in Seattle School District relied heavily on its earlier decision in Hunter v. Erickson, 393 U.S. 385 (1969). In Hunter v. Erickson, the Court held that a referendum which attempted to overturn antidiscrimination legislation in Akron, Ohio violated the equal protection clause. The Akron City Council, pursuant to its ordinary legislative processes, had enacted a fair housing ordinance. In response, the local citizenry, using an established referendum procedure, amended the city charter to provide that ordinances regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry, must be approved by a majority of the [voters] . . ." 393 U.S. at 387. The Court found that the legislation was intended to burden minorities and did so

by making it more difficult to pass antidiscriminatory legislation.

The tribes do not allege that the Commissioners' actions were "designed to accord disparate treatment"; instead they allege that the Commissioner was addressing the racial classification in the original enactment and that their share was diluted as a result. This is no more than a modification of an affirmative action program which was found to be constitutional by the Court in Crawford v. Los Angeles Board of Education. In Crawford, the Court found an amendment to the California Constitution which prohibited state courts from ordering busing unless a federal court would do so to remedy a violation of the federal equal protection clause did not violate the equal

protection clause. The Court reasoned:

The Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters. (footnote omitted) This distinction is implicit in the Court's repeated statement that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.

* * *

Were we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our heterogeneous population. States would be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice. And certainly the purpose of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities. (footnote omitted) Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects. (footnote omitted) Yet

these would be the results of requiring a State to maintain legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place.

458 U.S. at 538-540.

Like Crawford, the Commissioner's implementation of the Alaska revenue sharing program which made the funds available to all unincorporated communities was based on the Alaska Constitution. There is no claim that the Alaska Constitution has a disparate impact on minorities or even that it violates the equal protection clause. Therefore, the Commissioner's decision to comply with the Alaska Constitution and modify legislation in a neutral fashion to eliminate racial classifications does not form a basis for an equal protection challenge.

CONCLUSION

Amici states respectfully pray that Alaska's petition for a writ of certiorari be granted. Amici states believe that summary reversal may well be appropriate in the two questions presented herein because the Court of Appeals' decision is directly in conflict with governing decisions of this Court.

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In The
Supreme Court of the United States

October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

vs.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED MAY 14, 1990
WRIT OF CERTIORARI GRANTED OCTOBER 1, 1990

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

September 3, 1985 - Complaint filed by the Native Village of Akiachak, the Native Village of Noatak, and Circle Village in the United States District Court for the District of Alaska.

September 30, 1985 - Answer filed by the State of Alaska.

July 18, 1986 - Motion to dismiss filed by the State of Alaska.

October 28, 1987 - District Court issues an oral ruling of dismissal.

October 29, 1987 - District Court issues a written order of dismissal.

October 30, 1987 - Notice of appeal filed by the Native Village of Noatak.

November 5, 1987 - District Court issues a judgment of dismissal.

November 24, 1987 - Notice of appeal filed by Circle Village.

March 30, 1989 - Opinion issued by the Court of Appeals for the Ninth Circuit.

April 12, 1989 - Petition for rehearing and suggestion for rehearing en banc filed by the State of Alaska.

May 12, 1989 - Court of Appeals for the Ninth Circuit issues an order directing that a response to the petition for rehearing and suggestion for rehearing en banc be filed.

June 2, 1989 – Response to petition for rehearing and suggestion for rehearing en banc filed by the Native Village of Noatak and Circle Village.

July 7, 1989 – Court of Appeals for the Ninth Circuit issues an order that the parties file supplemental briefs on the issue of 11th amendment immunity.

February 12, 1990 – Court of Appeals for the Ninth Circuit withdraws its March 30, 1989 opinion, denies the petition for rehearing, rejects the suggestion for rehearing en banc, and issues an amended opinion.

May 14, 1990 – Petition for a writ of certiorari filed by the State of Alaska.

October 1, 1990 – Writ of certiorari granted by the United States Supreme Court.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | | |
|---------------------------|---|--------------|
| NATIVE VILLAGE OF |) | |
| AKIACHAK, NATIVE VILLAGE |) | |
| OF NOATAK, AND CIRCLE |) | No. A-85-503 |
| VILLAGE ON BEHALF OF |) | |
| THEMSELVES AND ALL |) | COMPLAINT |
| OTHERS SIMILARLY |) | FOR |
| SITUATED, |) | DECLARATORY |
| |) | AND |
| Plaintiffs, |) | INJUNCTIVE |
| |) | RELIEF |
| vs. |) | |
| EMIL NOTTI, AS |) | |
| COMMISSIONER DEPARTMENT |) | |
| OF COMMUNITY AND REGIONAL |) | |
| AFFAIRS, STATE OF ALASKA, |) | |
| Defendant. |) | |

The Plaintiffs on their own behalf and on behalf of all others similarly situated allege as follows:

JURISDICTION AND VENUE

1. This action is brought by Alaska Native Tribes and arises under the Constitution, laws, and treaties of the United States. The Court's jurisdiction is invoked under 28 U.S.C. 1331 (Federal Question); 28 U.S.C. 1343(3) (Civil Rights); and 28 U.S.C. 1362 (Indian Tribe); Venue properly lies in the District of Alaska under 28 U.S.C. 1391(b); Declaratory Relief is authorized by 28 U.S.C. 2201 and 2202 and Rule 57, Fed. R. Civ. P.

NATURE OF THE ACTION

2. This is a civil action for declaratory and injunctive relief, and for recovery of statutory entitlements withheld in violation of the Constitution and laws of the United States and the State of Alaska. Plaintiffs individually and on behalf of all others similarly situated, seek, a declaration that the actions of the Defendant in denying Plaintiffs their full entitlement of State Revenue Sharing funds and restricting use of the funds received, (a) violate Plaintiffs' rights under Articles I and VI and the First & Fourteenth Amendments to the United States Constitution, (b) infringe upon Plaintiffs' powers of self-government and are preempted by and in violation of federal law and policy, and (c) violate Plaintiffs' rights under Art I of the Alaska Constitution, the Revenue Sharing Act, AS 29.89.010 and AS 29.89.050 and the Administrative Procedure Act, AS 44.62.010 *et seq.*

PARTIES

3. Plaintiffs, Native Village of Akiachak (a.k.a.) Akiachak Native Community) and Native Village of Noatak are Native Village Governments situated within the State of Alaska with local governing bodies organized under the Indian Reorganization Act 25 U.S.C. 476, and are recognized by the United States.

4. Circle Village is a Native Village Government situated within the State of Alaska with a traditional Council form of government and is recognized by the United States.

5. Defendant, Emil Notti is the Commissioner of the Alaska State Department of Community and Regional Affairs (DCRA). As commissioner he is the principal executive officer of the Department AS 44.47.010, and responsible for administering the payment of State Revenue Sharing funds to Native Village Governments pursuant to AS 44.47.050 (14), AS 29.89.010 and AS AS 29.89.050.

CLASS ACTION ALLEGATIONS

6. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil procedure. The class Plaintiffs seek to represent includes all Alaska Native village governments in villages not incorporated as cities who were entitled to, but failed to receive, their full share of Revenue Sharing funds under AS 29.89.010 and AS 29.89.050.

7. The class is so numerous that joinder of all members is impracticable. While the exact number has yet to be determined, Plaintiffs estimate the class to consist of 55 Native village governments.

8. The questions of law and fact presented are common to the class. All members of the class were denied their full entitlement of Revenue Sharing funds and the right to unrestricted use of the funds received under AS 29.89.010 and AS 29.89.050.

9. The claims of the named Plaintiffs are typical of the claims of the class.

10. Plaintiffs are represented by competent counsel with extensive experience in the areas of Indian Law and

entitlement to Public benefits and will fairly and adequately protect the interests of the class.

11. This action is properly maintained as a class action in that:

(a) Separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendant who opposes the class; and

(b) The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications, or would substantially impair or impede their ability to protect their interests.

GENERAL ALLEGATIONS

12. On July 1, 1980 Sections AS 29.89.010 and AS 29.89.050 of the State Revenue Sharing Act were adopted. In pertinent part they provide:

AS 29.89.010 *Revenue Sharing Payable . . . the Department (of Community and Regional Affairs) shall pay aid . . . ,*

(2) to a Native village government under AS 29.89.050.

AS 29.89.050. *State aide to Native village governments. The state shall pay \$25,000 to a Native village government for a village which is not incorporated as a city under this title. In this section, Native village government means:*

(1) a local governing body organized by authority of the Act of Congress of June 18, 1934.

(2) a traditional village council or, if there is no traditional village council, the paramount chief or other governing body of a Native village which meets the requirements of 43 U.S.C. 1601-1628 (Alaska Native Claims Settlement Act). (§ 3 ch 155 SLA 1980).

13. Plaintiffs, Native Village of Noaktak [sic] and Circle Village are governments for Villages not incorporated as cities and therefore since July 1, 1980 have been authorized to receive annually, their pro-rata share of the funds appropriated by the legislature up to \$25,000, respectively, in unrestricted State Revenue Sharing funds pursuant to AS 29.89.010 and AS 29.89.050.

14. The City of Akiachak is in the process of dissolving its Municipal Government pursuant to AS 29.68.510-580. Upon its dissolution Plaintiff, Native Village of Akiachak will likewise become authorized to receive \$25,000 in State Revenue Sharing funds pursuant to AS 29.89.010 and AS 29.89.050.

15. Defendant Notti and his predecessors have, however, denied and continue to deny Plaintiffs their full entitlements of Revenue Sharing funds under these Statutes and restrict use of the funds Plaintiffs are allowed to receive. In so doing, Defendant Notti relies upon Opinions of the Department of Law dated April 27 and September 2, 1981, copies of which are attached hereto marked Exhibits A & B respectively. According to these Opinions, Native village governments are racially exclusive entities and therefore it would be unconstitutional to

read AS 29.89.010 and AS 29.89.050 literally, so as to limit aid exclusively to Native village governments. The Department of Law contends that excluding unincorporated non-Native villages, from the Revenue Sharing program would violate the Equal Protection provisions of the Federal and Alaska Constitutions, (14th Amend. U.S. Const., Article I, Section 1. Alaska Const.) as well as the Public Purpose provision of the latter, (Article IX, Section 6, Alaska Const). The Opinions also assert that these Constitutional provisions plus the Local Government provision of the Alaska Constitution (art.X sec.2) would be violated if Revenue Sharing funds were used for general support of Native village governments. Finally, the Opinions claim that the State is prohibited from supporting Native village governments, because the Alaska Native Claims Settlement Act 43, U.S.C. 1601 *et seq*, extinguished the governmental powers of all Native Villages with the exception of Metlakatla (Ex. A, p.1). The opinions, however, conclude that these unconstitutional results could be avoided by rewriting the Revenue Sharing Statutes to:

- (a) delete the terms "Native" and "Government" and the definition of "Native village government" from AS 29.89.010 and AS 29.89.050 thereby expanding the group of eligible Communities to include all unincorporated Villages, both Native and non-Native; and
- (b) prohibit the use of State Aid for the general support of Native village governments. (Ex. B p.1)

16. For the reasons set forth by the Department of Law in these opinions and following the Departments advice Defendant Notti and his predecessors:

- (a) expanded the class of eligible Revenue Sharing recipients under AS 29.89.010 and AS 29.89.050 to include entities other than Native village governments, thereby substantially diluting the Revenue Sharing funds available for distribution to Native village governments. A copy of the DCRA's Revenue Sharing Application which expressly expands the class is attached hereto as Exhibit C;
- (b) adopted Regulation 19 AAC 30.015 (c)(1) requiring Plaintiffs and their class, as a condition to receipt of Revenue Sharing funds under AS 29.89.010 and AS 29.89.050, to irrevocably dedicate such funds to a public purpose other than the general administration of Native village governments.

17. Prior to enlarging the group of eligible recipients of Revenue Sharing funds, thereby denying Plaintiffs and the class their full entitlements under AS 29.89.010 and 29.89.050, Defendant Notti and his predecessors failed to give notice, conduct hearings, submit and file proposed regulations or otherwise comply with the requirements of the Administrative Procedure Act, AS 44.62.010 *et seq.*

18. In every year since enactment of the Revenue Sharing Act on July 1, 1980, Defendant Notti and his predecessors have received money appropriated by the legislature for use of Plaintiffs and their class pursuant to AS 29.89.010 and AS 29.89.050. Since October 1, 1981, however, in reliance on the Opinions of the Department of Law, Defendant Notti and his predecessors have failed and refused to pay over to Plaintiffs and the class their

full Statutory entitlements which in equity and good conscience they should be paid. Defendant Notti owes Plaintiffs and their class \$853,587.51 for all such monies had and received.

19. The Department of Law's Construction of the Alaska Native Claims Settlement Act to extinguish Native Village powers of self-government and Defendant Notti and his predecessor's actions in adopting and implementing 19 AAC 30.051 (c)(1) based on such construction, are contrary to and in violation of the Alaska Native Claims Settlement Act which was designed to settle aboriginal lands claims and was not intended to, and did not, divest, diminish or in any way affect the governmental powers of Native Village Governments.

FIRST CAUSE OF ACTION

20. The actions of Defendant Notti and his predecessors in deliberately and purposely expanding the class of eligible Revenue Sharing recipients to include entities other than [sic] Native Village Governments, thereby depriving Plaintiffs and the class of their full entitlements under AS 29.89.010 and AS 29.89.050 were taken under color of State law and based solely on the racial ancestry of the individual members of Plaintiffs and their class and were therefore in violation of the Due Process, Equal Protection, Indian Commerce, and Supremacy Clauses of the United States Constitution, (Art I, Sec 1, 14th Amend; Art I, Sec 8, cl 3; Art VI, cl 2); as well as 42 U.S.C. 1983 and Federal Common Law authorizing discrete treatment of Indian Tribes and their members.

SECOND CAUSE OF ACTION

21. The actions of the Department of Community and Regional Affairs in depriving Plaintiffs and the class of their full entitlements of Revenue Sharing funds and in implementing Regulation 19 AAC 30.051 (c)(1), restricting the use of State Revenue Sharing funds, constitute an infringement upon tribal powers of self-government and are preempted by and in violation of federal laws and policy intended to further tribal self-government including the Indian Reorganization Act of 1934 (IRA), 48 Stat. 984, *as amended* with respect to Alaska Natives in 1936, 49 Stat. 1250, 25 U.S.C. 461-79; the Indian Civil Rights Act of 1968, Pub. L. 90-294 Title II, 82 Stat. 77, 25 U.S.C. 1301-1341; the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. 1451 *et seq*; the Indian Self-Determination and Education Act of 1975, 88 Stat. 2203, 25 U.S.C. Sections 450-450 n; the Indian Health Care Improvement Act of 1976, 90 Stat. 1400, 25 U.S.C. 1601 *et seq*; the Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. 1901 *et seq*; and The Indian Tribal Tax Status Act of 1982, Title II, Pub. L. No. 97-473, 26 Stat. 2605 *as amended* by Pub. L. No. 98-21, 97 Stat. 65, 25 U.S.C. 7871.

THIRD CAUSE OF ACTION

22. The actions of the Department of Community and Regional Affairs in depriving Plaintiffs and the class of their full entitlements of Revenue Sharing funds and in implementing Regulation 19 AAC 30.051 (c)(1) prohibiting Plaintiffs and their class from contracting for the use of State funds for the support of Native village governments and the State Constitutional provisions upon

which such regulation is purportedly based are preempted by and in violation of 25 U.S.C. 476 which grants Native Tribes and States the unrestricted right to contract with each other.

FOURTH CAUSE OF ACTION

23. The Department of Law's construction of the Alaska Native Claims Settlement Act to extinguish Native Village powers of tribal self-government and Defendant Notti and his predecessor's actions in adopting and implementing 19 AAC 30.051 (c)(1) and in expanding the class of eligible Revenue Sharing recipients, thereby denying Plaintiffs their full entitlements under AS 29.89.010 and AS 29.89.050 based on such construction, violate the First Amendment Rights of Plaintiffs, and their class as well as their respective individual members, to Freedom of Expression, Association and Religion in that the destruction of Native powers of self-government likewise destroys Native culture and their way of life – the most basic form of Expression, Religion and Association.

PENDENT JURISDICTION OF STATE CLAIMS

24. The Court has and should assume pendent jurisdiction over the Fifth through Eighth Causes of Action set forth below, which arise under Alaska State Law because they are based on the same operative facts as the federal causes of action set forth in the first four Causes of Action above and it would result in judicial economy, convenience and fairness to the parties.

FIFTH CAUSE OF ACTION

25. Defendant Notti and his predecessors unlawfully expanded the class of eligible Revenue Sharing recipients to include entities other than Native village governments, thereby denying Plaintiffs and the class their full Revenue Sharing entitlements without giving prior public notice, conducting hearings or submitting proposed regulations for filing in violation of the Administrative Procedure Act, AS 44.62.190-210.

SIXTH CAUSE OF ACTION

26. The failure of Defendant Notti and his predecessors to give Plaintiffs and the class their full entitlements of Revenue Sharing funds under AS 29.89.010 and AS 29.89.050 constitutes a breach of Defendant Notti and his predecessor's duty to pay over monies had and received for the use of Plaintiffs and their class.

SEVENTH CAUSE OF ACTION

27. The actions of Defendant Notti and his predecessors in implementing the Department of Community and Regional Affairs Regulation 19 AAC 30.051 (c)(1), prohibiting the use of Revenue Sharing funds for general administration of Native village governments were in violation of the Administrative Procedure Act, AS 44.62.030, as well as AS 29.89.010 and AS 29.89.050 because such prohibition is neither consistent with, nor reasonably necessary to carry out, such Statutes or other provisions conferring rule making authority on the Department of Community and Regional Affairs.

EIGHTH CAUSE OF ACTION

28. The actions of Defendant Notti and his predecessors in expanding the class of eligible Revenue Sharing recipients to include entities other than Native village governments, thereby denying Native village governments their full entitlements under AS 29.89.010 and AS 29.89.050 were taken under color of law and based solely on the racial ancestry of individual members of the respective Native village governments and were therefore in violation of the Due Process and Equal Protection Clauses of the Alaska Const., Art I, Sec 1.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the Court to issue an order:

1. Determining that this is a proper class action and that Plaintiffs are authorized to represent all other similarly situated.
2. Granting a preliminary and permanent injunction prohibiting Defendant Notti from paying over monies appropriated by the Legislature pursuant to AS 29.89.010 and AS 29.89.050 to such entities or in such manner as would preclude Plaintiffs and their class from receiving their full Revenue Sharing entitlements.
3. Granting a preliminary and permanent injunction enjoining Defendant Notti from implementing the Department of Community and Regional Affairs Regulation 19 AAC 30.015 (c)(1) or otherwise prohibiting the recipients of Revenue Sharing Funds under AS 29.89.010 and AS 29.89.050 from

using such funds to support their Native village governments.

4. Granting a preliminary and permanent injunction enjoining Defendant Notti, his successors in office, agents, employees, all persons acting by, through, or under him, and all persons subject to his supervision or acting in concert with him, from engaging in the unlawful acts described above, and ordering Defendant Notti to pay over to Plaintiffs and their class \$853,587.51 in Revenue Sharing funds which they would have otherwise received had the Defendant and his predecessors not engaged in said unlawful acts.
5. Granting a final Judgement declaring that:
 - (a) The actions of Defendant Notti and his predecessors in deliberately and purposely expanding the class of eligible Revenue Sharing recipients to include entities other than Native village governments, thereby depriving Plaintiffs and the class of their full entitlements under AS 29.89.010 and AS 29.89.050, were taken under color of State law and based solely on the racial ancestry of the individual members of Plaintiffs and their class and were therefore in violation of the Due Process, Equal Protection, Indian Commerce and Supremacy Clauses of the United States Constitution (art I, sec 1, 14th Amend; art I, sec 8, cl 3; art VI, cl 2) as well as 42 U.S.C. 1983 and Federal Common Law authorizing the discrete treatment of Indian Tribes and their members.
 - (b) The actions of the Department of Community and Regional Affairs in depriving Plaintiffs and the class of their full

- entitlements of Revenue Sharing funds and in implementing Regulation 19 AAC 30.051 (c)(1), restricting the use of State Revenue Sharing funds, constitutes an infringement upon Plaintiffs powers of self-government and are preempted by and in violation of Federal laws and policy intended to further tribal self-government including, the Indian Reorganization Act of 1934 (IRA), 48 Stat. 984, *as amended* with respect to Alaska in 1936, 49 Stat. 1250, 25 U.S.C. 461-79; the Indian Civil Rights Act of 1968, Pub. L. 90-294 Title II, 82 Stat. 77, 25 U.S.C. 1301-1341; the Indian Financing Act of 1974, 88 Stat. 77, 215 U.S.C. 1451 *et seq*; the Indian Self-Determination and Education Act of 1975, 88 Stat. 2203, 25 U.S.C. Section 450-450n; the Indian Child Welfare Act of 1978, 92 Stat. 3609, 25 U.S.C. 1901 *et seq*; the Indian Health Care Improvement Act of 1976, 90 Stat. 1400, 25 U.S.C. 1601 *et seq*; and the Indian Tribal Tax Status Act of 1982, Title II Pub. L. No. 97-473, 26 Stat. 2605 U.S.C. *as amended by* Pub. L. No. 98-21, 97 Stat. 65, 26 U.S.C. 7871
- (c) The Department of Community and Regional Affairs Regulation 19 AAC 30.051 (c)(1), prohibiting Plaintiffs and their class from contracting for the use of State Revenue Sharing funds for the support of Native village governments violates 25 U.S.C. 476 which grants Indian Tribes and States the unrestricted right to contract with each other.
 - (d) The Department of Law's construction of the Alaska Native Claims Settlement

Act to extinguish Native Village powers of self-government and Defendant Notti and his predecessor's actions in adopting and implementing 19 AAC 30.051 (c)(1) based on such construction, violate the First Amendment Rights of Plaintiffs and their class, as well as their respective individual members, to Freedom of Expression, Association and Religion in that the destruction of Native powers of self-government likewise destroys Native culture and their way of life – the most basic form of Expression, Religion and Association.

- (e) Defendant Notti and his predecessor's unlawfully expanded the class of eligible Revenue Sharing recipients to include entities other than Native village governments, thereby denying Plaintiffs and the class their full Revenue Sharing entitlements without giving prior public notice, conducting hearings or submitting proposed regulations for filing in violation of the Administrative Procedure Act, AS 44.62.190-210.
- (f) The failure of Defendant Notti and his predecessors to give Plaintiffs and the class their full entitlements of Revenue Sharing funds under AS 29.89.010 and AS 29.89.050 constitutes a breach of Defendant Notti and his predecessor's duty to pay over monies had and received for the use of Plaintiffs and their class.
- (g) The actions of Defendant Notti and his predecessors in implementing the Department of Community and

Regional Affairs Regulation 19 AAC 30.051 (c)(1), prohibiting the use of Revenue Sharing funds for general administration of Native village governments were in violation of the Administrative Procedure Act, AS 44.62.030, as well as AS 29.89.010 and AS 29.89.050 because such prohibition is neither consistent with, nor reasonably necessary to carry out, the purposes of AS 29.89.010 and AS 29.89.050 or other Statutory provisions conferring rule making authority on the Department of Community and Regional Affairs.

- (h) The actions of Defendant Notti and his predecessors in expanding the class of eligible Revenue Sharing recipients to include entities other than Native village governments, thereby denying Native village governments their full entitlements under AS 29.89.010 and AS 29.89.050 were taken under color of law and based solely on the racial ancestry of individual members of the respective Native village governments and were therefore in violation of the Due Process and Equal Protection Clauses of the Alaska Const., Art I, Sec 1.
6. Award Plaintiffs and their class pre-and post-judgment interest.
 7. Award Plaintiffs and their class costs and Attorney fees.

8. Grant such other and further relief as the Court may deem just and equitable.

/s/ Lawrence A. Aschenbrenner
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/s/ Mike Walleri
Mike Walleri
Attorney for Plaintiff
Circle Village

Exhibit A

MEMORANDUM

State of Alaska

To: Hon. Lee McAnerney, Commissioner Dept of Community & Regional Affairs

ATTN: Palmer McCarter, Director Div. of Local Gov't Asst

DATE: April 27, 1981

FILE NO: J-66-335-81

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

BY: /s/ R W P
Rodger W. Pegues
Assistant Attorney General

SUBJECT: State revenue sharing with IRA councils and traditional councils, chiefs, or other governing bodies

You have asked for additional advice on this subject.

Under AS 29.89.050, the state pays \$25,000 annually to a "Native village government for a village which is not incorporated as a city. . . ." The term is defined as a local governing body organized under section 16 of the Indian Reorganization Act, 25 U.S.C.A. § 476 (1963) which was applied to Alaska by the Act of May 1, 1936, 25 U.S.C.A. § 473a (1963),* or as a traditional village council, paramount chief, or other governing body of a village.

This statute creates serious constitutional problems. If the money is not expended by the recipient to provide public services in a racially non-discriminatory manner, the public purpose clause** and the equal protection clause*** of the Alaska Constitution will have been violated. *Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963). The test, however, is not the racial or religious character

* There is a question whether any section 16 tribal organization, other than the Metlakatla Indian Community Annette Islands Reserve, Alaska, still exercises governmental powers after the enactment of the Alaska Native Claims Settlement Act.

** Alaska Const., art. IX, § 6. "No tax shall be levied, or appropriation of public money made, or public property transferred . . . except for a public purpose."

*** Alaska Const., art. I, § 1; U.S. Const., Amend. XIV, § 1.

of the recipient but the character of the use to which the money will be put. *Id.* And the courts will look at the entire factual and governmental context on a case-by-case basis to determine whether the expenditure serves a public purpose. *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970). Accordingly, the constitutional provisions which require a public purpose and equal protection will not be offended so long as the services provided by a village council are furnished on a non-discriminatory basis.

A much less easily resolved problem lies in another provision of the Alaska Constitution, article X, section 2:

All local government power shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only.

This limitation of "local government power" to boroughs and cities is preceded by a purpose clause which states:

The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

The record of the debates at the Constitutional Convention makes it clear beyond reasonable doubt that this threefold statement of purpose and construction precisely and concisely sums up the essence of the article on local government and the intent of its framers. The framers perceived three evils hobbling local government in Alaska and elsewhere: One, there were a multiplicity of overlapping, special (often single) purpose districts, each

little known to the average voter and each monomaniacally pursuing its own goals in disregard and often in conflict with other special purpose districts occupying the same, or part of the same, area. Two, many of these districts operated on revenues from special purpose projects, for example sewage disposal districts. Others levied taxes. Their single purpose orientation, lack of centralized control and responsibility, distance from any meaningful relationship to the voters, and lack of any need to compete for a share of an integrated budget made tax levies and expenditures excessive and irrational. Three, the courts had hobbled local governments with general rules for construing their powers under which local governments could not respond to pressing needs because they could not find some express provision of a statute or charter which gave them the power to act on the subject. The framers crafted article X to cure or remove all three evils. *Fairview Pub. Util. Dist. No. 1 v. City of Anchorage*, 368 P.2d 540, 543-545 (Alaska 1962).

The provisions of article X carry out the framers purposes. They prescribed that a "liberal construction shall be given to the powers of local government units." Alaska Const., art. I, § 1. They limit local government powers to cities and boroughs. *Id.*, § 2. They allow the legislature to delegate taxing power to boroughs and cities only. *Id.* They prohibit new special districts ("service areas") from being established "if, consistent with the purposes of this article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city." *Id.*, § 5. The adoption of home rule charters is placed in the hands of local voters, *id.*, § 9, and home rule local governments have all powers

not prohibited by law or charter. *Id.*, § 11. Finally, to make boundary changes, including mergers, as easy as possible, a state commission is empowered to change them, subject only to a two-house veto by the legislature. *Id.*, § 12. In other words, if the constitution is followed, none of the three evils the framers sought to cure and avoid can exist in Alaska.

The use of traditional village councils or IRA councils to provide local government services is at odds with the constitution's provisions on local government. The public services they would perform are those which local governments perform. The Alaska Constitution limits the exercise of those powers by political subdivisions of the state to boroughs and cities. The tribal councils are neither. If they are duly organized under section 16 of the Act, 25 U.S.C.A. 476 (1963), they are tribal governments with sovereign immunity. *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F.Supp. 1127 (D. Alaska 1978); *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977). Financing a broad range of tribal government activities on the part of the councils is not for a public purpose of the state. Financing a broad range of non-tribal, local government activities through the councils would effectively raise them to the status of local governments. That conflicts with the constitutional mandate that the legislature may only use cities or boroughs to provide local government, and it indubitably removes any incentive – or even any rational basis – for a village to incorporate as a city. It would also have the practical effect of creating or sanctioning a racially exclusive de facto local government under color of state law, which is the reason that tribal councils cannot be designated by the state to be cities or

local governments. Under the Equal Protection Clause, the state cannot set up racially exclusive political subdivisions.

This is not to say that the state cannot *contract* with a racially (or religiously) exclusive group to provide public services or manage a public facility on a non-discriminatory basis for all the residents of a community. On a limited basis, therefore, grants can be made to IRA councils in their capacity as business corporations to provide some public services. The state constitution, however, bars the de facto establishment under state law of these councils as the local governments of Alaska's villages.

There is still another problem. In making monetary distribution to Native village governments but not to other potential applicants for grants in those villages and in other unincorporated communities, the statute may create equal protection problems by discriminating against the latter without a reasonable basis, if these are responsible parties which are equally capable of providing community services. This problem can be solved by amending the law to open the class of beneficiaries to other entities and other communities and including them, on application, in the distribution. We understand that there are 30 of these communities.

Turning to your specific questions, first to be eligible to participate in the revenue sharing program, the community must meet the statutory requirements, make application, and undertake to expend the money for public purposes on a non-discriminatory basis. Because the contract cannot be enforced in court unless Congress waives the tribal government's sovereign immunity, you

should use forfeiture of the grantee's right to a grant in the following fiscal year as an enforcement mechanism.

Second, state money cannot be expended for the costs of general administration because the village councils and other groups are not public agencies of the state or its political subdivisions. They are, on the one hand, federally recognized and organized tribal entities, and on the other, private associations or corporations. With respect to the former, depending on whether they are organized under section 16, section 17, or both of the Indian Reorganization Act, they are governmental, corporate, or both. In their governmental role, they are tribal. In their corporate role, they are private. All of them can provide public services on a non-discriminatory basis, and to the extent that they do so, a proportional share of their general administrative costs can be paid from state money.

Third, we know of no way to *insure* that the money will be spent for the good of the whole community. Obviously, each recipient must be required to promise that the money will be spent for the good of the entire community and to specify what public services it will provide on a racially non-discriminatory basis. Enforcement will be difficult against a tribal council acting in its governmental capacity under section 16 of the IRA. For that reason, if a section 17 corporation exists, the grant-contract should state that it is with the village council acting in its capacity as a business corporation.

RWP/pjg

cc: Hon. William R. Nix
Commissioner
Department of Public Safety

Daniel W. Hickey
Chief Prosecutor
Juneau AGO - Criminal Section

Exhibit B

MEMORANDUM

State of Alaska

To: Hon. Lee McAnerney, Commissioner Dept of Community & Regional Affairs

ATTN: Palmer McCarter, Director Div. of Local Gov't Asst

DATE: September 2, 1981

FILE NO: J-66-829-81

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

BY: /s/ L Davis
Laura L. Davis
Assistant Attorney General

SUBJECT: State financial aid to benefit unincorporated communities

By your memoranda of May 17 and June 12, 1981, you have asked us to address a number of questions related to state financial assistance to benefit unincorporated communities. First, as to your authority to distribute money to unincorporated villages under AS 29.89.050, we believe that statute to be unconstitutional if read

literally to restrict aid to Native villages. We also believe that the statute may be construed in a constitutional manner by severing the words "Native" and "government" and the definition of "Native village government." Second, with regard to state financial aid to unincorporated communities in general, we will discuss the relevant constitutional principles which apply to the questions you have raised.

AS 29.89 provides for annual revenue sharing with municipalities (for roads, AS 29.89.020), operators of health facilities and hospitals (AS 29.89.030), volunteer fire departments in the unorganized borough (AS 29.89.040), and Native village governments (AS 29.89.050). As discussed in our memorandum of April 27, 1981, aid to Native village governments raises serious issues under (1) article IX, section 6 of the Alaska Constitution which prohibits expenditure of public money unless the expenditure is for a public purpose; (2) article I, section 1, which accords equal protection to all persons; and, (3) article X, section 2, which provides for the exercise of local governmental powers only by cities and boroughs which are incorporated under state law.

We stated that the public purpose requirement was satisfied if the money were used for public benefit, and not for the private benefit of a racially exclusive group. We also indicated that a local organization could receive and spend state money for the benefit of a community without becoming a de facto unit of local government. As to equal protection, we stated that the distribution of state money to a racially exclusive organization did not deny equal protection to persons who are not members of

the organization, if benefits provided with the funds were made available to the public at large.

However, as we noted, the payment of state money under AS 29.89.050 *only* to those unincorporated communities which are identified as Native villages does exclude from participation a number of similarly situated communities which are not Native villages. The first inquiry necessary to determine if a statute is valid under Alaska's equal protection test is whether the statute has a legitimate purpose. *State v. Erickson*, 574 P.2d 1 (Alaska 1978).

Of the three possible purposes for AS 29.89.050 which we have identified, the only legitimate one is to provide public services to residents of unincorporated communities.* If the statutory purpose were illegitimate under the Alaska Constitution, the statute would be unenforceable. There is a heavy presumption in favor of the constitutionality of any statute. SUTHERLAND STATUTORY CONSTRUCTION § 45.11.

* A purpose to benefit Native villages solely because of the racial ancestry of their inhabitants would not be legitimate in the absence of a special motivation such as compensation for loss of aboriginal property rights. No such special motivation appears to be present here. A purpose to encourage the Native villages to assume the responsibilities of local governmental units would be in conflict with article X, section 2, of the constitution, and thus will not be inferred, despite the use of the term "Native village government."

We note that the Act which added AS 29.89 stated no purpose for that chapter, but did state a purpose for adding the general revenue sharing chapter, AS 29.88, as follows:

(Continued on following page)

Assuming that the legislature intended by AS 29.89.050 to provide public services to the residents of unincorporated communities, the means chosen are only loosely suited to that purpose because of the existence in the state of a substantial number of unincorporated communities whose residents would not be benefitted by the literal language of AS 29.89.050. Since the distinction is based upon the racial ancestry of the communities, we might conclude that the statute is unconstitutional despite its legitimate purpose. However, we note that the Alaska Supreme Court has held that a statute which denied equal protection by limiting its application to members of one sex (prohibiting prostitution by females) could be construed as constitutional by severing the offending restrictive language, and thereby expanding application of the statute to all persons. *Plas v. State*, 598 P.2d 966 (Alaska 1979).

The interpretation of AS 29.89.050 presents an analogous problem. The effect of severing the offending restriction to "Native" village "governments," and deleting the definition of that term, is to expand the group of

(Continued from previous page)

It is the purpose of sec. 2 of this Act to

(1) improve the revenue raising and distribution system for the benefit of residents of home rule and general law municipalities by providing for more equitable allocation of financial resources among municipalities to improve their fiscal capacities; and

(2) assure that no municipality suffers impoverishment of necessary public services, relative to other municipalities, because of the chance location of taxable wealth in the state.

eligible communities to include all "villages."* Although this interpretation alters the literal wording of the statute significantly and is, therefore, not to be implemented hastily, *State v. Campbell*, 536 P.2d 105 (Alaska 1975), it does avoid the alternative interpretation that the statute is unconstitutional and void. The law strongly favors the construction of statutes to be consistent with constitutional requirements. *State v. Sundberg*, 611 P.2d 44 (Alaska 1980); *Summers v. Anchorage*, 589 P.2d 863 (Alaska 1979). According to Sutherland:

It has even been said that "a strained construction is not only permissible, but desirable if it is the only construction that will save constitutionality."

SUTHERLAND STATUTORY CONSTRUCTION § 45.11 at 34 (footnote omitted). We believe that the interpretation of AS 29.89.050 to authorize grants of state money to all villages is the only interpretation consistent with our constitution.

According to your estimates, the dilution of revenue sharing funds caused by including other unincorporated communities under AS 29.89.050 will not cause significant diminution [sic] in the fund allotments. Further, this interpretation is consistent with the subsequent action of the legislature in providing for grants to all unincorporated communities. 1981 Alaska Sess. L., ch. 60, § 2. We believe that under the circumstances, the Alaska courts would uphold an administrative interpretation of AS

* A parallel deletion of "Native" and "government" from AS 29.89.010(b) is also necessary.

29.89.050 to permit revenue sharing to all villages in the state, regardless of their racial composition or ancestry.

A question arises as to the meaning of "village" under AS 29.89.050, in the absence of the language limiting it to a Native village organized under federal law. Generally, a village is any discrete and identifiable place where a group of people reside in close proximity, intend to remain in the place indefinitely, and carry on ordinary human social and economic activities as a community. *Wyandotte Sav. Bank v. Eveland*, 78 N.W.2d 612, 617, 347 Mich. 33; *Union Sav. Bank of Patchogue v. Saxon*, 335 F.2d 718, 721 (D.C. Cir. 1964). Your administrative regulations interpreting and implementing chapter 60, SLA 1981 should provide appropriate guidelines for both that Act and for AS 29.89.050.

Your memorandum of May 17 asked a number of questions regarding your assistance to local governments and to communities in the unorganized borough. Generally, the three constitutional principles discussed above should guide your conduct. You must administer money under your control in order to ensure that it is spent to achieve a public purpose. This requires active supervision of all grants and contracts, especially those transferring money to an organization other than a municipal government. Village and regional Native corporations are not incorporated as cities or boroughs and are not considered to be local governments under state law.

The equal protection provision requires that you administer your programs in order to provide similar treatment for people or organizations which are similarly situated, unless there is a very strong reason for treating

them differently. The distinction between a municipality and an unincorporated village is created by the Alaska Constitution. This different treatment of municipalities is justified because of their status and duties as governmental entities. For example, the state may make general revenue sharing grants to municipalities, to be used at the discretion of the municipal government. The public purpose requirement is met by the operation of state law and the Alaska Constitution controlling the activities of municipal governments. The state may not make general revenue sharing grants to non-governmental entities. In administering the grants to villages under AS 29.89 and to unincorporated communities under chapter 60, SLA 1981, you must ensure that the money is spent to achieve a public purpose.

The local government article of the Alaska Constitution (article X) provides for the exercise of local government powers by cities and boroughs and for the provision of services by multi-purpose service areas. In administering services in the organized borough, the state may contract with any entity capable of providing the needed service, as long as the contractor is actively supervised by the state, and not permitted to become de facto, a local government.

You are not absolutely prohibited by the constitution from contracting for the delivery of services by profit-making corporations or by Native organizations which may have sovereign status, if the services are necessary and no other capable and responsible contractor is available. However, it would be inconsistent with your duties as an administrator of public funds, to contract with these organizations if another more responsible and capable

I.LD/pjg

The Defendants Emil Notti, Commissioner of the Alaska Department of Community and Regional Affairs, and the State of Alaska for their answer allege as follows:

JURISDICTION AND VENUE

1. Defendants deny the allegations set out in paragraph 1 of plaintiffs' complaint. Defendants allege that the court should defer to the jurisdiction of the Alaska Superior Court which is considering claims in *Circle Village v. Smith*, No. 4FA-85-1197 CIV. (Alaska Super., May 31, 1985), which are similar to those presented to this court.

NATURE OF THE ACTION

2. Defendants admit the allegations contained in the first sentence of paragraph 2. Defendants deny the allegations contained in the second sentence of paragraph 2 that plaintiffs represent a class of similarly situated individuals. The remaining allegations set out in paragraph 2 are conclusions of law which require no response.

PARTIES

3. Defendants deny the allegations set out in paragraph 3 and allege that under state law Akiachak is a second class city organized under AS 29, Noatak is an unincorporated community within the unorganized borough and that both communities are not situated within an Indian reservation. Defendants deny that Noatak Village is a government or that governmental status is necessary to receive revenue sharing payments.

4. Defendants admit that Circle Village is an unincorporated community in the unorganized borough. Defendants deny that the Circle Village traditional village

council is a government or that governmental status is necessary to receive state revenue sharing payments.

5. Defendants admit the allegations set out in paragraph 5.

CLASS ACTION ALLEGATIONS

6. Defendants lack sufficient knowledge to admit or deny the allegations set out in paragraphs 6 - 11 of plaintiffs' complaint.

GENERAL ALLEGATIONS

12. The defendants allege that the allegations set out in paragraph 12 are conclusions of law which require no response.

13. Defendants deny the allegations set out in paragraph 13 of plaintiffs' complaint to the extent that entities purporting to have governmental status operating in the vicinity of Noatak and Circle Village entitle those communities to benefits provided by state law in any manner different from other unincorporated communities in the state.

14. Defendants admit that the City of Akiachak has petitioned to the Local Boundary Commission for dissolution of its municipal corporation. The defendants lack sufficient knowledge to admit or deny the remaining allegations set out in paragraph 14.

15. Defendants deny the allegations set out in the first sentence of paragraph 15 that defendant Notti has denied plaintiffs benefits under the state revenue sharing

program. Defendants allege that plaintiffs have been paid a pro rata share of available appropriations made to finance this function. Defendants lack sufficient knowledge to admit or deny the allegations set out in the second sentence of paragraph 15. Defendants deny the allegations set out in the third sentence of paragraph 15 and allege that any construction of AS 29.89.010 and 29.89.050 applied by defendants is based on the fact that all unincorporated communities in the state must be treated equally. The defendants admit the remaining allegations set out in paragraph 15.

16. The defendants deny the allegations set out in paragraph 16.

17. Defendants deny the allegations set out in paragraph 17 of plaintiffs' complaint.

18. Defendants admit that in every year since July 1, 1980, defendant Notti has paid each revenue sharing recipient a pro rata share of appropriations made by law to finance the revenue sharing program. Defendants specifically deny that revenue sharing payments are "entitlements" and also deny the remainder of the allegations set out in paragraph 18.

19. Defendants assert that the allegations set out in paragraph 19 of plaintiffs' complaint are conclusions of law which require no response.

FIRST CAUSE OF ACTION

20. Defendants allege that action taken to reduce plaintiffs' revenue sharing payments was based on considerations other than the racial ancestry of plaintiffs. The

defendants deny the remaining allegations set out in paragraph 20.

SECOND CAUSE OF ACTION

21. Defendants contend the allegations set out in paragraph 21 are conclusions of law which require no response.

THIRD CAUSE OF ACTION

22. Defendants contend the allegations set out in paragraph 22 are conclusions of law which require no response.

FOURTH CAUSE OF ACTION

23. Defendants contend the allegations set out in paragraph 23 are conclusions of law which require no response.

PENDENT JURISDICTION OF STATE CLAIMS

24. Defendants allege that Causes of Action five through eight are not appropriate for the exercise of federal jurisdiction. Defendants deny the allegations set out in paragraph 24.

FIFTH CAUSE OF ACTION

25. Defendants deny the allegations set out in paragraph 25 of plaintiffs' complaint.

SIXTH CAUSE OF ACTION

26. Defendants assert that the allegations set out in paragraph 26 are conclusions of law which require no response.

SEVENTH CAUSE OF ACTION

27. Defendants assert that the allegations set out in paragraph 27 are conclusions of law which require no response.

EIGHTH CAUSE OF ACTION

28. Defendants deny that any action complained of by plaintiffs was taken based on the racial ancestry of plaintiffs. Defendants assert the remaining allegations set out in paragraph 28 are conclusions of law which require no response.

29. Defendants deny each allegation set out in the complaint which have not been specifically admitted.

AFFIRMATIVE DEFENSE

1. Plaintiffs are barred from obtaining injunctive relief because they have failed to assert their claims in a timely manner.

PRAYER FOR RELIEF

Defendants prays this honorable court to

1. give plaintiffs nothing;

2. deny plaintiffs the relief requested in paragraphs 1 - 8 of their prayer for relief;

3. award defendants their costs and attorney fees; and

4. grant defendants other relief the court considers just.

DATED: September 26, 1985.

HAROLD M. BROWN
ATTORNEY GENERAL

By: /s/ James L. Baldwin
James L. Baldwin
Assistant Attorney General

By: /s/ Susan D. Cox
Susan D. Cox
Assistant Attorney General

EXHIBIT A

AFFIDAVIT OF MARTY RUTHERFORD
Civil Action No. A85-503HAROLD M. BROWN
ATTORNEY GENERALDouglas K. Mertz
Assistant Attorney General
State of Alaska
Department of Law
P. O. Box K - State Capitol
Juneau, Alaska 99811
Attorneys for Plaintiff [sic - Defendants]IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKANATIVE VILLAGE OF AKIACHAK,)
NATIVE VILLAGE OF NOATAK,) Civil Action
AND CIRCLE VILLAGE ON) No. A85-503
BEHALF OF THEMSELVES AND)
ALL OTHERS SIMILARLY) AFFIDAVIT OF
SITUATED,) MARTYPlaintiffs,)
)
)vs.)
)
)EMIL NOTTI, AS COMMISSIONER)
OF DEPARTMENT OF)
COMMUNITY AND REGIONAL)
AFFAIRS, STATE OF ALASKA,)Defendants.)
)
)STATE OF ALASKA)
)

FIRST JUDICIAL DISTRICT)

: ss.

I, Marty Rutherford, being first duly sworn upon
oath, deposes and says:

1. I am Director of the Division of Municipal and Regional Assistance of the Alaska Department of Community and Regional Affairs. My division's responsibilities include administration of the aid to unincorporated communities program under Alaska Statute 29.60.140 (formerly AS 29.89.050). I am familiar with the history of the program and how it has been administered by this department.

2. The program was created by the Alaska Legislature in 1980 and first implemented in Fiscal Year 1981. During 1981 the department received advice from the Attorney General's Office that the program violated the Alaska Constitution by limiting disbursements to only those unincorporated communities with "Native Village governments." (See the attached memoranda from the Attorney General's Office, Exhibits A-1, A-2, and A-3.) The department then decided, again with the advice of the Attorney General, to expand the program to include all unincorporated communities. The expansion did not begin immediately, with the FY 82 disbursements, since the 1981 Alaska Legislature had appropriated funds for FY 82 only for the Native communities. The Department included in its budget request to the 1982 legislature (for the FY 83 budget) a notification that the Attorney General had recommended expansion of the program to cover all unincorporated communities and the expanded number of applications we anticipated receiving as a result. (Exhibit A-4). The legislature appropriated funds for the expanded programs for FY 83 and has for each subsequent year. (Attached are our budget requests for those

years describing the expanded program and the expanded number of recipients, and our annual reports to the legislature listing the actual recipients and the amounts received. (Exhibit A-5).

3. In 1985 the Legislature rewrote the municipal code (Title 29) and as part of the rewrite repealed AS 29.89.050. It replaced that statute with AS 29.60.140, which requires exactly the same program as we had been carrying out since FY 83. all unincorporated communities are eligible, with the funds being administered by either a Native council or a nonprofit corporation. The new statute became effective on January 1, 1986, and we assumed that FY 86 funds were to come under it, not under the repealed statute, since actual disbursements are given out in the spring (except for limited advance payments), after the new law became effective. Of course the new statute requires exactly what we had been doing since FY 83, so there was no real impact on our program administration.

4. The legislature has never fully funded this program, either before or after the expansion. Each year the legislature makes a lump sum appropriation for all of the department's revenue-sharing program, with an allocation of part of it to the "Miscellaneous Services Account" set up in AS 29.60.170 (former AS 29.89.080). That account funds the following payments:

- roads at \$2,500 per mile (AS 29.60.110(a), formerly AS 29.89.020(a));
- ice roads at \$1,500 per mile (AS 29.60.110(b), formerly AS 29.89.020(b));

- hospitals at \$250,000 per facility over 10 beds (AS 29.60.120(a)(1), formerly AS 29.89.030(a)(1));
- health facilities at \$2,000 per bed (AS 29.60.120(a)(3), formerly AS 29.89.030(a)(3));
- volunteer fire departments at \$10 per person served in the unorganized borough (AS 29.60.130, formerly AS 29.89.040);
- unincorporated communities at \$25,000 per community (AS 29.60.140, formerly Native village governments under AS 29.89.050).

Each of those programs has a separate "entitlement" figure, similar to the \$25,000 figure in AS 29.60.140 (and former AS 29.89.050). Since the total entitlements in any one year under these programs generally exceeds the appropriations, the legislature requires a pro rata distribution among all eligible recipients (AS 29.60.170 and former AS 29.89.080). So each year the department totals the statutory entitlements under all of these programs, divides that figure into the total lump sum appropriation for the programs, and derives a percentage figure which is the pro rata share of the entitlement received by each program recipient. As a result, communities eligible under AS 29.60.140 (and former AS 29.89.050) have received less than the statutory \$25,000 each year of the program because of the budgetary shortfall. The actual disbursement to each community each year of the program has been as follows:

| | |
|-------|----------|
| FY 81 | \$21,079 |
| FY 82 | \$23,194 |
| FY 83 | \$19,933 |

| | |
|-------|----------|
| FY 84 | \$21,037 |
| FY 85 | \$23,104 |
| FY 86 | \$22,785 |

4. To my knowledge the only reason the legislature has short-funded this program is ordinary fiscal conservatism, as reflected by cutbacks in almost all our budgetary requests. I know of no evidence that any shortfall in any year occurred because the legislature intended to fund only Native villages. On the contrary, since the program was expanded in 1983 it has been clear that the legislature intended to provide funds to all unincorporated communities.

5. No one brought any legal challenge to the department's expansion of the program until 1985, when the Circle Village Council filed an administrative appeal in the Alaska Superior Court and when this lawsuit was filed. No recipient other than the Circle Village Council pursued any administrative remedy or filed an administrative appeal.

6. Circle Village Council did not apply for funds under the program in FY 83, FY 84, or FY 86, but did apply for FY 85. An application for FY 85 was also received from the Circle Civic Community Association, a local nonprofit group which received the program funds in FY 83, 84, and 86. (After a hearing and investigation the FY 85 funds were split between the two organizations. See exhibit A-6).

Akiachack is an incorporated city and so is ineligible for the aid to unincorporated community program, nor has it applied for funds. In response to a community

inquiry, however Commissioner Notti advised the community in February, 1986 that it was not eligible for municipal assistance due to its failure to meet technical requirements for cities under AS 29.60.290(1)-(3). He concluded that Akiachak would be eligible for unincorporated community aid, however. But in March, 1986, after consulting counsel, the commissioner concluded that since Akiachak's petition to dissolve its municipal incorporation had been unsuccessful, it could not be considered eligible for aid to unincorporated communities.

7. All funds for the unincorporated community program for FY 85 and earlier years have been disbursed. Payments for FY 86 have been sent out, except that, on the court's order, we held back \$30,037 from the non-Native communities in case the court rules that they are entitled to additional funds. (By our calculations, if the court found that the 49 Native village applicants for FY 86 funds were to receive more money to bring them up to the level they would be at without non-Native village participation, each village would receive an extra \$613.)

This money is being held back from the entitlements of the 23 communities from which entities other than Native councils applied. Those communities are:

- | | |
|----------------|----------------------|
| * Cantwell | Kenny Lake |
| Big Delta | * Manley Hot Springs |
| Central | McKinley Park |
| Coffman Cove | Paxson |
| * Copper River | Point Baker |
| * Circle | Port Protection |
| Edna Bay | * Red Devil |
| * Egegik | * Sleetmute |
| Elfin Cove | * Takotna |
| * False Pass | Tok |
| Gustavus | Healy |
| Hyder | |

(The communities marked with an asterix [sic] have some form of Native council, but the Native council did not apply for the funds; instead a community nonprofit group applied.)

DATED: 7-10-86

/s/ Marty Rutherford

SUBSCRIBED AND SWORN TO before me this 10th day of July, 1986.

ROBERT S. MEANS
NOTARY PUBLIC
STATE OF ALASKA

/s/ Robert S Means
Notary Public, State of Alaska
My commission expires: 8-8-86

EXHIBIT A-1

to

Affidavit of Marty Rutherford

Civil Action No. A85-503

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 15, 1981

Hon. Ramona L. Barnes
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: Grants to unincorporated
communities

Dear Representative Barnes:

This responds to your request for advice on the constitutionality of limiting revenue sharing for unincorporated communities to those organized under the Indian Reorganization Act of 1934 (IRA), 25 U.S.C.A. § 476 (1963), or eligible as a Native Village under the Alaska Native Claims Settlement act (ANCSA), 43 U.S.C.A. § 1611.

We believe that the limitation may well be unconstitutional under the equal protection clause of the state constitution. Alaska Const., art. I, § 1.

According to the Department of Community and Regional Affairs, there are 30 unincorporated communities outside of organized boroughs, with a population

of 3,867 people, which are not IRA or ANCSA villages. These include, for example, Tok, Big Delta, Chicken, Dunbar, Elfin Cove, Evansville, Glenallen, Gustavus, Healy, Hyder, McKinley Park, Point Baker, Thorne Bay, Two Rivers, and Whale Pass.

To meet equal protection requirements, the basis for distinguishing between unincorporated communities must bear a reasonable relationship to a legitimate governmental goal. The goal is to provide public benefits in the form of facilities and services made available to the public at large on a nondiscriminatory basis. That can be done by any identifiable, responsible local group which, given the grant, is ready, willing, and able to do so. This is precisely how the program for rural development assistance works under AS 44.47.130. Accordingly, limiting grantees to tribal councils appears to have no reasonable basis, and therefore, may violate the equal protection clause. It is this limitation which runs afoul of the constitution, not the categorical grants themselves.

The proper corrective action is to amend the revenue sharing legislation to enlarge the class of beneficiaries.

Sincerely yours,

WILSON L. CONDON
ATTORNEY GENERAL

By: /s/ Rodger W Pegues
Rodger W. Pegues
Assistant Attorney General

RWP/pjs

EXHIBIT A-2

to
Affidavit of Marty Rutherford

Civil Action No. A85-503

MEMORANDUM

State of Alaska

TO: Hon. Lee McAnerney, Commissioner Dept of Community & Regional Affairs

ATTN: Palmer McCarter, Director Div. of Local Gov't Asst

DATE: April 27, 1981

FILE NO: J-66-335-81

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

BY: /s/ R W P
Rodger W. Pegues
Assistant Attorney General

SUBJECT: State revenue sharing with IRA councils and traditional councils, chiefs, or other governing bodies

You have asked for additional advice on this subject.

Under AS 29.89.050, the state pays \$25,000 annually to a "Native village government for a village which is not incorporated as a city" The term is defined as a local governing body organized under section 16 of the Indian Reorganization Act, 25 U.S.C.A. § 476 (1963) which was applied to Alaska by the Act of May 1, 1936, 25 U.S.C.A.

§ 473a (1963),* or as a traditional village council, paramount chief, or other governing body of a village.

This statute creates serious constitutional problems. If the money is not expended by the recipient to provide public services in a racially non-discriminatory manner, the public purpose clause** and the equal protection clause*** of the Alaska Constitution will have been violated. *Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963). The test, however, is not the racial or religious character of the recipient but the character of the use to which the money will be put. *Id.* And the courts will look at the entire factual and governmental context on a case-by-case basis to determine whether the expenditure serves a public purpose. *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970). Accordingly, the constitutional provisions which require a public purpose and equal protection will not be offended so long as the services provided by a village council are furnished on a non-discriminatory basis.

A much less easily resolved problem lies in another provision of the Alaska Constitution, article X, section 2:

All local government power shall be vested in boroughs and cities. The State may delegate

* There is a question whether any section 16 tribal organization, other than the Metlakatla Indian Community Annette Islands Reserve, Alaska, still exercises governmental powers after the enactment of the Alaska Native Claims Settlement Act.

** Alaska Const., art. IX, § 6. "No tax shall be levied, or appropriation of public money made, or public property transferred . . . except for a public purpose."

*** Alaska Const., art. I, § 1; U.S. Const., Amend. XIV, § 1.

taxing powers to organized boroughs and cities only.

This limitation of "local government power" to boroughs and cities is preceded by a purpose clause which states:

The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

The record of the debates at the Constitutional Convention makes it clear beyond reasonable doubt that this three-fold statement of purpose and construction precisely and concisely sums up the essence of the article on local government and the intent of its framers. The framers perceived three evils hobbling local government in Alaska and elsewhere: One, there were a multiplicity of overlapping, special (often single) purpose districts, each little known to the average voter and each monomaniacally pursuing its own goals in disregard and often in conflict with other special purpose districts occupying the same, or part of the same, area. Two, many of these districts operated on revenues from special purpose projects, for example sewage disposal districts. Others levied taxes. Their single purpose orientation, lack of centralized control and responsibility, distance from any meaningful relationship to the voters, and lack of any need to compete for a share of an integrated budget made tax levies and expenditures excessive and irrational. Three, the courts had hobbled local governments with general rules for construing their powers under which local governments could not respond to pressing needs because they could not find some express provision of a statute or

charter which gave them the power to act on the subject. The framers crafted article X to cure or remove all three evils. *Fairview Pub. Util. Dist. No. 1 v. City of Anchorage*, 368 P.2d 540, 543-545 (Alaska 1962).

The provisions of article X carry out the framers purposes. They prescribe that a "liberal construction shall be given to the powers of local government units." Alaska Const., art. I, § 1. They limit local government powers to cities and boroughs. *Id.*, § 2. They allow the legislature to delegate taxing power to boroughs and cities only. *Id.* They prohibit new special districts ("service areas") from being established "if, consistent with the purposes of this article, the new service can be provided by an existing service area, by incorporation as a city, or by annexation to a city." *Id.*, § 5. The adoption of home rule charters is placed in the hands of local voters, *id.*, § 9, and home rule local governments have all powers not prohibited by law or charter. *Id.*, § 11. Finally, to make boundary changes, including mergers, as easy as possible, a state commission is empowered to change them, subject only to a two-house veto by the legislature. *Id.*, § 12. In other words, if the constitution is followed, none of the three evils the framers sought to cure and avoid can exist in Alaska.

The use of traditional village councils or IRA councils to provide local government services is at odds with the constitution's provisions on local government. The public services they would perform are those which local governments perform. The Alaska Constitution limits the exercise of those powers by political subdivisions of the state to boroughs and cities. The tribal councils are neither. If they are duly organized under section 16 of the

Act, 25 U.S.C.A. 476 (1963), they are tribal governments with sovereign immunity. *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F.Supp. 1127 (D. Alaska 1978); *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977). Financing a broad range of tribal government activities on the part of the councils is not for a public purpose of the state. Financing a broad range of non-tribal, local government activities through the councils would effectively raise them to the status of local governments. That conflicts with the constitutional mandate that the legislature may only use cities or boroughs to provide local government, and it indubitably removes any incentive - or even any rational basis - for a village to incorporate as a city. It would also have the practical effect of creating or sanctioning a racially exclusive de facto local government under color of state law, which is the reason that tribal councils cannot be designated by the state to be cities or local governments. Under the Equal Protection Clause, the state cannot set up racially exclusive political subdivisions.

This is not to say that the state cannot contract with a racially (or religiously) exclusive group to provide public services or manage a public facility on a non-discriminatory basis for all the residents of a community. On a limited basis, therefore, grants can be made to IRA councils in their capacity as business corporations to provide some public services. The state constitution, however, bars the de facto establishment under state law of these councils as the local governments of Alaska's villages.

There is still another problem. In making monetary distribution to Native village governments but not to other potential applicants for grants in those villages and

in other unincorporated communities, the statute may create equal protection problems by discriminating against the latter without a reasonable basis, if these are responsible parties which are equally capable of providing community services. This problem can be solved by amending the law to open the class of beneficiaries to other entities and other communities and including them, on application, in the distribution. We understand that there are 30 of these communities.

Turning to your specific questions, first to be eligible to participate in the revenue sharing program, the community must meet the statutory requirements, make application, and undertake to expend the money for public purposes on a non-discriminatory basis. Because the contract cannot be enforced in court unless Congress waives the tribal government's sovereign immunity, you should use forfeiture of the grantee's right to a grant in the following fiscal year as an enforcement mechanism.

Second, state money cannot be expended for the costs of general administration because the village councils and other groups are not public agencies of the state or its political subdivisions. They are, on the one hand, federally recognized and organized tribal entities, and on the other, private associations or corporations. With respect to the former, depending on whether they are organized under section 16, section 17, or both of the Indian Reorganization Act, they are governmental, corporate, or both. In their governmental role, they are tribal. In their corporate role, they are private. All of them can provide public services on a non-discriminatory basis, and to the extent that they do so, a proportional share of

their general administrative costs can be paid from state money.

Third, we know of no way to *insure* that the money will be spent for the good of the whole community. Obviously, each recipient must be required to promise that the money will be spent for the good of the entire community and to specify what public services it will provide on a racially non-discriminatory basis. Enforcement will be difficult against a tribal council acting in its governmental capacity under section 16 of the IRA. For that reason, if a section 17 corporation exists, the grant-contract should state that it is with the village council acting in its capacity as a business corporation.

RWP/pjs

cc: Hon. William R. Nix
Commissioner
Department of Public Safety

Daniel W. Hickey
Chief Prosecutor
Juneau AGO - Criminal Section

EXHIBIT A-3
to
Affidavit of Marty Rutherford
 Civil Action No. A85-503

MEMORANDUM State of Alaska
 To: Hon. Lee McAnerney, Commissioner Dept of Community & Regional Affairs
 ATTN: Palmer McCarter, Director Div. of Local Gov't Asst
 DATE: September 2, 1981
 FILE NO: J-66-829-81
 TELEPHONE NO: 465-3600
 FROM: WILSON L. CONDON
 ATTORNEY GENERAL
 BY: /s/ L Davis
 Laura L. Davis
 Assistant Attorney General
 SUBJECT: State financial aid to benefit unincorporated communities

By your memoranda of May 17 and June 12, 1981, you have asked us to address a number of questions related to state financial assistance to benefit unincorporated communities. First, as to your authority to distribute money to unincorporated villages under AS 29.89.050, we believe that statute to be unconstitutional if read literally to restrict aid to Native villages. We also believe that the statute may be construed in a constitutional manner by severing the words "Native" and "government" and the definition of "Native village government."

Second, with regard to state financial aid to unincorporated communities in general, we will discuss the relevant constitutional principles which apply to the questions you have raised.

AS 29.89 provides for annual revenue sharing with municipalities (for roads, AS 29.89.020), operators of health facilities and hospitals (AS 29.89.030), volunteer fire departments in the unorganized borough (AS 29.89.040), and Native village governments (AS 29.89.050). As discussed in our memorandum of April 27, 1981, aid to Native village governments raises serious issues under (1) article IX, section 6 of the Alaska Constitution which prohibits expenditure of public money unless the expenditure is for a public purpose; (2) article I, section 1, which accords equal protection to all persons; and, (3) article X, section 2, which provides for the exercise of local governmental powers only by cities and boroughs which are incorporated under state law.

We stated that the public purpose requirement was satisfied if the money were used for public benefit, and not for the private benefit of a racially exclusive group. We also indicated that a local organization could receive and spend state money for the benefit of a community without becoming a de facto unit of local government. As to equal protection, we stated that the distribution of state money to a racially exclusive organization did not deny equal protection to persons who are not members of the organization, if benefits provided with the funds were made available to the public at large.

However, as we noted, the payment of state money under AS 29.89.050 *only* to those unincorporated communities which are identified as Native villages does exclude from participation a number of similarly situated communities which are not Native villages. The first inquiry necessary to determine if a statute is valid under Alaska's equal protection test is whether the statute has a legitimate purpose. *State v. Erickson*, 574 P.2d 1 (Alaska 1978).

Of the three possible purposes for AS 29.89.050 which we have identified, the only legitimate one is to provide public services to residents of unincorporated communities.* If the statutory purpose were illegitimate

* A purpose to benefit Native villages solely because of the racial ancestry of their inhabitants would not be legitimate in the absence of a special motivation such as compensation for loss of aboriginal property rights. No such special motivation appears to be present here. A purpose to encourage the Native villages to assume the responsibilities of local governmental units would be in conflict with article X, section 2, of the constitution, and thus will not be inferred, despite the use of the term "Native village government."

We note that the Act which added AS 29.89 stated no purpose for that chapter, but did state a purpose for adding the general revenue sharing chapter, AS 29.88, as follows:

It is the purpose of sec. 2 of this Act to

(1) improve the revenue raising and distribution system for the benefit of residents of home rule and general law municipalities by providing for more equitable allocation of financial resources among municipalities to improve their fiscal capacities; and

(2) assure that no municipality suffers impoverishment of necessary public services, relative to other municipalities, because of the chance location of taxable wealth in the state.

under the Alaska Constitution, the statute would be unenforceable. There is a heavy presumption in favor of the constitutionality of any statute. SUTHERLAND STATUTORY CONSTRUCTION § 45.11.

Assuming that the legislature intended by AS 29.89.050 to provide public services to the residents of unincorporated communities, the means chosen are only loosely suited to that purpose because of the existence in the state of a substantial number of unincorporated communities whose residents would not be benefitted by the literal language of AS 29.89.050. Since the distinction is based upon the racial ancestry of the communities, we might conclude that the statute is unconstitutional despite its legitimate purpose. However, we note that the Alaska Supreme Court has held that a statute which denied equal protection by limiting its application to members of one sex (prohibiting prostitution by females) could be construed as constitutional by severing the offending restrictive language, and thereby expanding application of the statute to all persons. *Plas v. State*, 598 P.2d 966 (Alaska 1979).

The interpretation of AS 29.89.050 presents an analogous problem. The effect of severing the offending restriction to "Native" village "governments," and deleting the definition of that term, is to expand the group of eligible communities to include all "villages."* Although this interpretation alters the literal wording of the statute significantly and is, therefore, not to be implemented

* A parallel deletion of "Native" and "government" from AS 29.89.010(b) is also necessary.

hastily, *State v. Campbell*, 536 P.2d 105 (Alaska 1975), it does avoid the alternative interpretation that the statute is unconstitutional and void. The law strongly favors the construction of statute to be consistent with constitutional requirements. *State v. Sundberg*, 611 P.2d 44 (Alaska 1980); *Summers v. Anchorage*, 589 P.2d 863 (Alaska 1979). According to Sutherland:

It has even been said that "a strained construction is not only permissible, but desirable if it is the only construction that will save constitutionality."

SUTHERLAND STATUTORY CONSTRUCTION § 45.11 at 34 (footnote omitted). We believe that the interpretation of AS 29.89.050 to authorize grants of state money to all villages is the only interpretation consistent with our constitution.

According to your estimates, the dilution of revenue sharing funds caused by including other unincorporated communities under AS 29.89.050 will not cause significant diminution [sic] in the fund allotments. Further, this interpretation is consistent with the subsequent action of the legislature in providing for grants to all unincorporated communities. 1981 Alaska Sess. L., ch. 60, § 2. We believe that under the circumstances, the Alaska courts would uphold an administrative interpretation of AS 29.89.050 to permit revenue sharing to all villages in the state, regardless of their racial composition or ancestry.

A question arises as to the meaning of "village" under AS 29.89.050, in the absence of the language limiting it to a Native village organized under federal law. Generally, a village is any discrete and identifiable place where a group of people reside in close proximity, intend

to remain in the place indefinitely, and carry on ordinary human social and economic activities as a community. *Wyandotte Sav. Bank v. Eveland*, 78 N.W.2d 612, 617, 347 Mich. 33; *Union Sav. Bank of Patchogue v. Saxon*, 335 F.2d 718, 721 (D.C. Cir. 1964). Your administrative regulations interpreting and implementing chapter 60, SLA 1981 should provide appropriate guidelines for both that Act and for AS 29.89.050.

Your memorandum of May 17 asked a number of questions regarding your assistance to local governments and to communities in the unorganized borough. Generally, the three constitutional principles discussed above should guide your conduct. You must administer money under your control in order to ensure that it is spent to achieve a public purpose. This requires active supervision of all grants and contracts, especially those transferring money to an organization other than a municipal government. Village and regional Native corporations are not incorporated as cities or boroughs and are not considered to be local governments under state law.

The equal protection provision requires that you administer your program in order to provide similar treatment for people or organizations which are similarly situated, unless there is a very strong reason for treating them differently. The distinction between a municipality and an unincorporated village is created by the Alaska Constitution. This different treatment of municipalities is justified because of their status and duties as governmental entities. For example, the state may make general revenue sharing grants to municipalities, to be used at the discretion of the municipal government. The public purpose requirement is met by the operation of state law

and the Alaska Constitution controlling the activities of municipal governments. The state may not make general revenue sharing grants to non-governmental entities. In administering the grants to villages under AS 29.89 and to unincorporated communities under chapter 60, SLA 1981, you must ensure that the money is spent to achieve a public purpose.

The local government article of the Alaska Constitution (article X) provides for the exercise of local government powers by cities and boroughs and for the provision of services by multi-purpose service areas. In administering services in the unorganized borough, the state may contract with any entity capable of providing the needed service, as long as the contractor is actively supervised by the state, and not permitted to become de facto, a local government.

You are not absolutely prohibited by the constitution from contracting for the delivery of services by profit-making corporations or by Native organizations which may have sovereign status, if the services are necessary and no other capable and responsible contractor is available. However, it would be inconsistent with your duties as an administrator of public funds, to contract with these organizations if another more responsible and capable contractor is available. An entity which may be immune from contract enforcement because of its sovereign status should be considered less responsible to accept a state grant than any corporate entity.

We will defer your request for an authoritative statement of the powers of tribal governments for the time

being, and hope that these general guidelines are adequate to resolve your immediate problems.

LLD/pjg

NATIVE VILLAGE OF NOATAK; Circle Village, Plaintiffs-Appellants,

and

Native Village of Akiachak, Plaintiff,

v.

David HOFFMAN, as Commissioner, Department of Community and Regional Affairs, State of Alaska, Defendant-Appellee.

Nos. 87-4310, 87-4374.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 3, 1988.

Decided March 30, 1989.

Native villages brought federal and state claims against Alaskan official seeking order directing that he pay over revenue sharing monies appropriated by legislature and prohibiting him from diluting villages' share in violation of federal law. The United States District Court for the District of Alaska, Andrew J. Kleinfeld, J., dismissed action for lack of subject-matter jurisdiction, and two native villages appealed. The Court of Appeals, Noonan, J., held that: (1) both tribes were "duly recognized" within meaning of statute conferring federal question jurisdiction on federal district courts over civil actions brought by tribes "duly recognized" by Secretary of Interior; (2) Alaska's sovereign immunity from native villages' suit was overridden by congressional action, inasmuch as United States could sue as trustee on behalf of villages and thus villages could sue on their own behalf; (3) villages properly invoked federal subject-matter jurisdiction by alleging that Commissioner violated

federal laws and policies intended to further tribal self-government by expanding class of eligible recipients of legislative appropriation to include entities other than native villages.

Reversed and remanded.

Kozinski, Circuit Judge, filed dissenting opinion.

Lawrence A. Aschenbrenner and Robert T. Anderson, Anchorage, Alaska, for plaintiffs-appellants.

Gary I. Amendola and Douglas K. Mertz, Asst. Attys. Gen., Juneau, Alaska, for defendant-appellee Hoffman.

Appeal from the United States District Court for the District of Alaska.

Before KOZINSKI, NOONAN and THOMPSON, Circuit Judges.

NOONAN, Circuit Judge:

The Native Village of Noatak, the Native Village of Akiachak and Circle Village brought this action against the Commissioner of the Department of Community and Regional Affairs of the State of Alaska (the Commissioner). The district court dismissed the case for want of jurisdiction. The Native Village of Noatak and Circle Village (the Native Villages) appeal to this court. We reverse and remand.

The Parties

Noatak is a government with a local governing board organized under the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.* Circle Village has a tradition Council form of

government. The defendant Commissioner is the principal officer of a department of the state of Alaska, responsible for administering the payment of revenue-sharing funds.

The Causes of Action

The Native Villages allege that they have been authorized to receive their pro rata share of the funds appropriated by the Alaska Legislature, up to \$25,000 in accordance with Alaska Stat. §§ 29.89.010 and 29.89.050, which provided, "the state shall pay \$25,000 to a Native Village government for a village which is not incorporated as a city under this title." Alaska Stat. § 29.89.050 (1980). The plaintiffs allege that the Commissioner deliberately expanded the class of eligible recipients to include entities other than the Native Villages solely because of the racial ancestry of the individual members of the villages, in violation of the federal Constitution of 42 U.S.C. § 1983 and of federal common law authorizing discrete treatment of Indian tribes, with the result that their share was diluted.

As a second cause of action the Native Villages assert that in so diluting the funds available the Commissioner violated federal laws and policy intended to further tribal self-government, including the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*; the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341; the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*; the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*; the Indian Health Care Improvement Act, 25 U.S.C.

§§ 1601-1680 and the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.*

As a third cause of action the Native Villages allege that the Commissioner's conduct also violated 25 U.S.C. § 476, which, they contend, grants native tribes the unrestricted right to contract with states. As a fourth cause of action the Native Villages claim that the Commissioner's conduct violated the First Amendment by destroying native culture and therefore their most basic form of expression, religion and association. Four additional claims are put forward as pendent state claims. The plaintiffs seek an order directing the Commissioner to pay over the monies appropriated by the Legislature and an injunction prohibiting further administration of the statute in a way that would preclude the plaintiffs from receiving a full share.

Proceedings

The district court held that the court did not have jurisdiction because the plaintiffs' suit was barred by the eleventh amendment or because, in the alternative, the case did not arise under the Constitution, laws or treaties of the United States. This appeal followed.

Analysis

1. *The Sovereign Immunity of the State of Alaska*

The Commissioner contends that the eleventh amendment was properly applied by the district court to deny jurisdiction. The eleventh amendment by its terms does not bar suit in the federal courts against a state by

its own citizens. In *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), it was held that a state could not be sued by one of its own citizens seeking to make it perform its contracts but that "any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted." *Id.* at 20-21, 10 S.Ct. at 509. The opinion appears to rest as much on a reading of Article III of the Constitution as on a judicial expansion of the terms of the eleventh amendment. Nonetheless since the date of its decision it has been customary to think of *Hans* as extending the eleventh amendment to bar suits against a state by its own citizens. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

The continued vitality of *Hans* is in question, both by reason of the arguments directed against it and by the actual vote in *Welch v. Texas Dept. of Highways*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). With the court divided four to four and Justice Scalia declaring that he was unwilling to address *Hans*, it is not clear how long *Hans* will remain good law. We are, however, obliged to apply *Hans* in this case.

Whether the eleventh amendment bars an Indian tribe from suing a state is not apparent from its text, which refers only to suits against a state by citizens of another state or of a foreign state. The fundamental opinion of Chief Justice Marshall holds that an Indian tribe is not a foreign state that could bring a suit in the Supreme Court under Article III of the Constitution; rather, Indian tribes are "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). By the same reasoning an Indian tribe is not embraced within

the literal language of the eleventh amendment. On the other hand, the structure of the opinion in *United States v. Minnesota*, 270 U.S. 181, 193, 46 S.Ct. 298, 300, 70 L.Ed. 539 (1926), points to a bar against suit by an Indian tribe. But *Arizona v. California*, 460 U.S. 605, 614, 103 S.Ct. 1382, 1388, 75 L.Ed.2d 318 (1983), indicates that the matter is still open. We assume without deciding that the state does enjoy immunity unless it has been overridden by action of the United States.

2. Congressional Action Overriding the Sovereignty of Alaska.

28 U.S.C. § 1362 provides that the district courts "shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

Two questions arise as to the applicability of this statute. The first is whether the Native Villages have been "duly recognized by the Secretary of the Interior." The Native Villages represent bodies of Indians of the same race united in a community under a single government in a particular territory - Noatak at Bering Strait, Circle Village at Upper Yukon - Porcupine. They therefore meet the basic criteria to constitute Tribes. *Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 359-60, 45 L.Ed. 521 (1901).

No statute expressly outlines how a tribe may become duly recognized for purposes of § 1362 jurisdiction. In *Price v. State of Hawaii*, 764 F.2d 623, 626 (9th

Cir.1985), this court left open the question whether formal organization or incorporation of a tribe followed by approval of the organization or incorporation by the Secretary of the Interior constituted being "duly recognized" for the purpose of the statute. We see no reason to suppose that the Secretary of the Interior needs to issue a special document conferring a right to sue under the statute. Noatak Village has a governing body approved by the Secretary. 25 U.S.C. § 476. It is therefore a tribe with a duly recognized governing body and qualifies for the benefits of § 1362.

Circle Village, like Noatak, is listed as a Native Village in the Alaska Native Claims Act, 43 U.S.C. § 1610(b)(1). The purpose of this Act was to make "a fair and just settlement of all claims by Natives and Native Groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). The Villages acknowledged by the Act were distinguished from ineligible villages "of a modern and urban character," where the majority of the residents were not natives. 43 U.S.C. § 1610(b)(2), (3). The Villages acknowledged by the Act were possessed of aboriginal land claims and became eligible for the benefits provided under the Act. The Act was congressional recognition of the Native Villages.

In addition, in three recently enacted statutes – the Indian Self-Determination Act, 25 U.S.C. § 450(b); the Indian Financing Act, 25 U.S.C. § 1452(c), and the Indian Child Welfare Act, 25 U.S.C. § 1903(8) – Congress treated the Native villages as Indian tribes. Arguably, Congress intended to confer recognition only for the particular purposes of each piece of legislation. See, e.g., *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1386-87 (9th

Cir.1988) (recognition under Indian Reorganization Act not conclusive as to tribal status). But the nature and scope of the federal government's relationship with the Native Villages, as evidenced by these Acts, indicates that the recognition extends to legal claims.

It is true that § 1362 speaks of recognition by the Secretary of the Interior, not Congress, but the Secretary is only using power delegated by Congress. If Congress has recognized the tribe, a fortiori the tribe is entitled to recognition and is in fact recognized by the Secretary of the Interior. Consequently, Circle Village, as well as Noatak, qualifies under § 1362.

The second question presented as to § 1362 is whether in this case, assuming a federal question is presented, the statute overrides the immunity of the state. The Second Circuit has recognized the statute as containing a broad grant of jurisdiction over federal question suits brought by tribes. *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1080 (2d Cir.1982). To the contrary is the Eighth Circuit *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir.1974).

For the Eighth Circuit, Judge Webster reasoned that the only purpose of the statute was to let tribes sue to protect "their federally derived property rights," and that, to obtain jurisdiction, a tribe's complaint must make an allegation "which would have made the United States the real party in interest even if the United States had brought the action as Trustee." *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d at 1140. Judge Webster further noted that the United States had not waived its own sovereign immunity by enacting § 1362 and that there

was equally no reason to believe that the statute abrogated the sovereign immunity of the several states. *Id.*

This line of reasoning is not persuasive. As will be seen below, the right of the United States to act as a trustee is not confined to "federally derived property rights." There is, moreover, inconsistency in saying that the United States must be "the real party in interest" and have a "direct interest" *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d at 1140, and at the same time acknowledging that if the United States sued it would be as a trustee with the real interest necessarily being that of the tribal beneficiaries. Finally, there is no parallel between the immunity of the United States and the immunity of the several states. The interest of the United States as a trustee in empowering its wards to sue the individual states is of a very different character from the United States as trustee consenting to suits against itself. We turn, therefore, to the reasons advanced by Judge Mansfield for the Second Circuit.

Part of Judge Mansfield's reasoning rested on the grant of power by the states to Congress to "regulate commerce . . . with the Indian tribes," U.S. Const., art. I, § 8, cl. 3, and the conclusion from this grant that the states had necessarily "surrendered a portion of their sovereignty as to suit by Indian tribes." *Oneida Indian Nation*, 691 F.2d at 1079 (quoting *Parden v. Terminal Railway*, 377 U.S. 184, 191, 84 S.Ct. 1207, 1212, 12 L.Ed.2d 233 (1964)). The reasoning of *Parden* was rejected in *Welch v. State Dept. of Highways*, 483 U.S. 468, 107 S.Ct. 2941, 2948, 97 L.Ed.2d 389 (1987). In order to abrogate a state's immunity, Congress must express its intention "in unmistakably clear language." *Welch*, 107 S.Ct. at 2948; see also

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985).

Does § 1362 express an unmistakable intention? Statutes passed for the benefit of Indian Tribes "are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976) (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918)). The Supreme Court has held that § 1362 "suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf." *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 474, 96 S.Ct. 1634, 1642, 48 L.Ed.2d 96 (1976). We read § 1362, thus authoritatively interpreted, to mean that the statute does authorize Indian tribes to sue where the United States could sue on their behalf.

The United States could bring suit on the causes of action alleged here. The standard was established long ago. In the *Cherokee Nation* case, chief Justice Marshall observed that the relation between the Indian tribes and the United States "resembles that of a ward to his guardian. They look to our government for protection." *Cherokee Nation v. Georgia*, *supra* at 17. The analogy was suggestive and effective in imposing fiduciary [sic] obligations upon the United States. The dependence of the tribes generated "the duty of protection." *United States v. Thomas*, 151 U.S. 577, 585, 14 S.Ct. 426, 429, 38 L.Ed. 276 (1894); *United States v. Kagama*, 118 U.S. 375, 384, 6 S.Ct. 1109, 1114, 30 L.Ed. 228 (1886).

Speaking specifically of the relation of the United States to the Cherokees but using language applicable to the relationship between the United States and any Indian tribe, Justice Hughes wrote that as long as the United States is the guardian of the Indians, "the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid." *Heckman v. United States*, 224 U.S. 413, 437, 32 S.Ct. 424, 431, 56 L.Ed. 820 (1912). Addressing the right of the United States as the guardian of non-competent Osage Indians, Chief Justice White upheld the right of the United States to sue "to prevent the systematic violation of the state law committed for the purpose of destroying the rights created by the Acts of Congress." *United States v. Board of County Commissioners*, 251 U.S. 128, 133, 40 S.Ct. 100, 101, 64 L.Ed. 184 (1919).

The general proposition is drawn from these cases "that the United States, by virtue of its special relationship with the Indians, has standing to effectuate federal policies by enforcing Indian rights arising out of that relationship." *Cohen's Handbook of Federal Indian Law* (1982) p. 308. The federal oversight of Indian affairs is an "exclusive and compelling interest." See *Housing Authority v. Washington*, 629 F.2d 1307, 1313 (9th Cir.1980) (per Anderson, J.). Each of the four federal causes of action here alleged involve that interest.

The United States is not barred by the immunity of any single state. *Monaco v. Mississippi*, 292 U.S. 313, 319, 54 S.Ct. 745, 746, 78 L.Ed. 1282 (1934). Consequently, if the United States could bring these actions as the trustee of an Indian tribe, the tribes may sue a state under section

1362. The United States, we have concluded, could sue as a trustee on behalf of the tribe to vindicate the rights in the several causes of action here. Consequently the case should not have been dismissed on the ground of the immunity of the state.

3. *The Federal Causes of Action.*

The state maintains that the plaintiffs have not alleged federal causes of action. Obviously there was no duty on the part of Alaska to vote a bonus of \$25,000 to each Native Village. Once having voted the bonus, however, the state could not take it away or dilute it on grounds violative of the fourteenth amendment. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), *reh'g denied*, 411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418 (1973). The plaintiffs allege that such a racially based dilution is what has occurred.

The state's answer is, "How can this be? We were giving a bonus to Native Villages whose membership was formed on a racial basis. We got away from the racial basis by making a nonracial criterion the ground for the distribution." The plaintiffs' answer is that the original scheme of the bonus was based on their identity as political entities. To wipe out their political status on the ground that that status had an ethnic origin is itself a violation of the constitutional command not to discriminate on the basis of race. Paradoxical as it is, the allegation that the move from a tribal basis to a non-tribal basis for the bonus was racially discriminatory is an intelligible

claim. Any governmental action based on the racial character of those affected is presumptively invalid. *Washington v. Seattle School District No. 1*, 458 U.S. 457, 485, 102 S.Ct. 3187, 3202-03, 73 L.Ed.2d 896 (1982). Alleging that such discrimination has happened here, the Native Villages have presented a claim which is neither plainly meritless under the Constitution nor foreclosed by prior cases. Cf. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). Whether these allegations state a claim upon which relief can be granted is beside the point at this stage of the case. *Bell v. Hood*, 327 U.S. 678, 678-82, 66 S.Ct. 773, 773-76, 90 L.Ed. 939 (1946). The scope of our present inquiry is limited to a determination of whether the district court had jurisdiction. We hold that it did.

The Villages also properly invoked federal subject matter jurisdiction by their allegation that the Commissioner violated federal laws and policies intended to further tribal self-government. If, as they contend, the Commissioner acted because he believed that Native Villages could not receive special benefits from the state, the Commissioner did act in an area where the action may be found to have been preempted by federal law. *White Mt. Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). Similar conclusions follow as to the third and fourth causes of action where again it may be found that the action of the Commissioner was such as to deny the political reality of the Native Villages because of the Commissioner's view of their racial composition. The pendent claims are cognizable if the four federal claims confer jurisdiction. Accordingly, the decision of the district court is REVERSED and the case REMANDED for further proceedings.

KOZINSKI, Circuit Judge, dissenting.

I am unable to join my colleagues in exploring the boundaries of the eleventh amendment because I do not agree that the district court had subject matter jurisdiction. Subject matter jurisdiction and sovereign immunity are both threshold inquiries, but the former presents a far easier question and I would therefore dispose of the case on those grounds. While I don't necessarily disagree with the majority's analysis of the eleventh amendment issue, the question is a close one, having already caused a split in the circuits; I would await a case where our jurisdiction is more secure before expounding on this difficult point. I must therefore respectfully dissent.

To state a federal claim, it is not enough to invoke a constitutional provision or to come up with a catalogue of federal statutes allegedly implicated. Rather, as the Supreme Court has repeatedly admonished, it is necessary to state a claim that is substantial: "[T]he federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' 'wholly insubstantial,' 'obviously frivolous,' 'plainly unsubstantial,' or 'no longer open to discussion' " *Hagans v. Lavine*, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577 (1974) (citations omitted). We do not have jurisdiction over a claim, no matter how federal it purports to be, that is " 'patently without merit, or so insubstantial, improbable, or foreclosed by Supreme Court precedent as not to involve a federal controversy.' " *City of Las Vegas v. Clark County*, 755 F.2d 697, 701 (9th Cir.1985) (quoting *Demarest v. United States*, 718 F.2d 964,

966 (9th Cir.1983), *cert. denied*, 466 U.S. 950, 104 S.Ct. 2150, 80 L.Ed.2d 536 (1984)).

While this doctrine has been criticized, *see, e.g., Hagans*, 415 U.S. at 538, 94 S.Ct. at 1379; *Rosado v. Wyman*, 397 U.S. 397, 404, 90 S.Ct. 1207, 1213, 25 L.Ed.2d 442 (1970); *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), it serves an important practical purpose: It prevents plaintiffs from using a federal court's pendent jurisdiction to propel state claims into federal court by attaching them to meritless federal claims. *See Hagans*, 415 U.S. at 555, 94 S.Ct. at 1388 (Rehnquist, J., dissenting); *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 191-92, 29 S.Ct. 451, 454-55, 53 L.Ed. 753 (1909). And that is precisely what's happening here.

In 1980, the Alaska Legislature enacted a revenue sharing program according to which all unincorporated communities with a Native village government would receive \$25,000 a year. The following year, the state Attorney General advised the Department of Community and Regional Affairs, the state agency responsible for implementing the program, that the program violated the equal protection and public purpose clauses of the Alaska Constitution, art. I, § 1 and art. IX, § 6. In order to comply with the state constitution, the Department made the funds available to all unincorporated communities, whether or not they had Native village governments. The appellants, whose share of the pie may have been diminished when the class of recipients was broadened, disagreed with the Attorney General's analysis and filed this suit.

The villages' purported federal claim is that the state, once having decided to favor Indians over other citizens, is now precluded from treating them the same. As a matter of federal equal protection, this claim is frivolous: I am aware of no constitutional provision that requires a state to treat Indians and non-Indians differently. While the equal protection clause may *permit* states to favor Indians, it certainly does not *compel* it. The villages' equal protection claim is not aided in any way by the fact that the state Attorney General's equality requirement is based on the Alaska Constitution; the federal equal protection clause does not preclude the states from adopting constitutional provisions that guarantee equal treatment for their citizens.

Equally frivolous are the villages' claims based on various federal statutes intended to further tribal self-government. The Indian Reorganization Act, 25 U.S.C. §§ 461-92 (1982 & Supp. IV 1986), comprises a hodgepodge of statutes relating to land transfer and tribal organization. The Indian Civil Rights Act of 1968, Pub.L. 90-284, 82 Stat. 77-80 (codified as amended in scattered sections of title 25), extends a number of federal constitutional rights to members of Indian tribes and authorizes state courts to assume jurisdiction over certain causes of action arising on Indian reservations. The Indian Financing Act of 1974, Pub.L. 93-262, 88 Stat. 77 (codified as amended in scattered sections of title 25), provides credit to members of Indian tribes. The Indian Self-Determination and Education Assistance Act, Pub.L. 93-638, 88 Stat. 2203 (codified as amended in scattered sections of titles 5, 25, 42 & 50), provides federal assistance for, among other things, tribal governments and school districts educating

tribe members. The Indian Health Care Improvement Act, Pub.L. 94-437, 90 Stat. 1400 (codified as amended in scattered sections of title 25), as its name implies, relates to health care. The Indian Child Welfare Act of 1978, Pub.L. 95-608, 92 Stat. 3069 (codified as amended in scattered sections of title 25), includes provisions covering child custody proceedings and federal assistance for various family-related programs. Many of these statutes provide money to Indian tribes, but that is the full extent of their relevance to this lawsuit. By no stretch of the imagination do they preempt state constitutional provisions calling for equal treatment of Indians and non-Indians.

The villages' third and fourth federal causes of action are similarly insubstantial. Section 476 of title 25 permits Indian tribes to organize, adopt a constitution, and negotiate with the federal, state and local governments. It is difficult to ascertain exactly how this statute could be violated by diluting the villages' share of state revenues. The villages' contention that the dilution extinguished their powers of self-government and destroyed their Native culture, in violation of the first amendment, is hyperbole.

Even under the most generous construction of the federal Constitution and title 25 of the United States Code, the four federal claims fit any of the *Hagans* formulations of insubstantiality: They are "obviously frivolous;" they are "plainly unsubstantial;" they are "absolutely devoid of merit." They serve a single purpose: to transport state claims into federal court. I would accordingly affirm the district court's dismissal for lack of a substantial federal question and save the difficult eleventh amendment issue for another day. Judging from the

state's relationship with the villages, that day may be coming soon enough.

⑦
No. 89-1782

Supreme Court, U.S.

FILED

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CLERK

In The
Supreme Court of the United States

October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

On Writ Of Certiorari To The United States
Court of Appeals For the Ninth Circuit

BRIEF FOR THE PETITIONER

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November 15, 1990

QUESTIONS PRESENTED

1. Did the States give up their sovereign immunity when sued by an Indian tribe in federal court by consenting upon entry into the Union to be bound by the Commerce Clause of the United States Constitution?

2. Is an Indian group automatically a tribe for the purposes of 28 U.S.C. § 1362 (federal jurisdiction over suits by Indian tribes) because it can organize under the Alaska Native Reorganization Act or because it is identified as a "Native village" in the Alaska Native Claims Settlement Act?¹

¹ As to the third question listed in the petition for a writ of certiorari, see page 6, n.8, *infra*.

LIST OF PARTIES

Petitioner:

David Hoffman, Commissioner, Department of Community and Regional Affairs, State of Alaska

Respondents:

Native Village of Noatak

Circle Village

Plaintiff in the proceedings in the United States District Court only:

Native Village of Akiachak

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No. 89-1782

In The
Supreme Court of the United States
 October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
 OF COMMUNITY AND REGIONAL AFFAIRS,
 STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
 CIRCLE VILLAGE,

Respondents.

On Writ Of Certiorari To The United States
 Court of Appeals For the Ninth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 896 F.2d 1157 (Pet. App. B-3). The October 28, 1987, Order of the United States District Court for the District of Alaska, filed December 1, 1987, is unpublished (Pet. App. A-5).

JURISDICTION

On March 30, 1989, the Court of Appeals for the Ninth Circuit issued an opinion reversing the decision of the United States District Court for the District of Alaska. *Native Village of Noatak v. Hoffman*, 872 F.2d 1384 (9th Cir. 1989) (*Noatak I*). The State of Alaska filed a petition for rehearing and suggestion for rehearing en banc. On February 12, 1990, the Ninth Circuit withdrew its March 30, 1989, opinion, denied the petition for rehearing, rejected the suggestion for rehearing en banc, and issued an amended opinion. *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990) (*Noatak II*). The petition for a writ of certiorari was filed on May 14, 1990 and was granted on October 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In 1980, the Alaska legislature enacted AS 29.89.050.² The statute created a State revenue sharing program for

² AS 29.89.050 provided:

The state shall pay \$25,000 to a Native village government for a village which is not incorporated as a city under this title. In this section, "Native village government" means

(1) a local governing body organized by authority of the Act of Congress of June 18, 1934 (25 U.S.C. sec. 476); or

(2) a traditional village council or, if there is no traditional village council, the paramount chief or

(Continued on following page)

unincorporated communities with Native village governments. The program was first implemented in fiscal year 1981.³ On advice of the Alaska Attorney General that the revenue sharing program violated several provisions of the Alaska Constitution,⁴ the commissioner expanded the program to include all unincorporated communities and made subsequent appropriation requests to the Alaska legislature for the expanded class of recipients. J.A. 43.⁵

During the time the program was implemented as expanded, the legislature appropriated about the same amount of money per year for each eligible community as

(Continued from previous page)

other governing body of a Native village which meets the requirements of the Alaska Native Claims Settlement Act (43 U.S.C. sec. 1601-1628). (§ 3, ch. 155, SLA 1980).

³ Fiscal years for the State of Alaska run from July 1 - June 30.

⁴ It was the opinion of the Attorney General that the statute violated the equal protection and public purpose provisions of the Alaska Constitution because (1) similarly situated unincorporated communities without Native village governments were excluded from the program, and (2) it could not be guaranteed that the money provided under the program would be used for the good of the whole community. See Exhibits A-1, A-2, and A-3 to the Affidavit of Marty Rutherford. J.A. 49-65.

⁵ The Commissioner delayed the expansion until fiscal year 1983 in order to give the Alaska legislature the opportunity to appropriate funds for the expanded class of recipients. The legislature did just that. The expanded program continued through fiscal year 1985, when the Alaska legislature repealed AS 29.89.050 and replaced it with AS 29.60.140, which continues that administratively expanded program. J.A. 43-44.

before the expansion. J.A. 44-46. The legislature never appropriated the full amount authorized under the statute - \$25,000 - either before or after the expansion of the program. J.A. 45-46. The Native Village of Noatak and Circle Village, among others, received funds under the program, both as enacted, and as expanded. J.A. 43-48.⁶

In calendar year 1985, the legislature repealed AS 29.89.050 and enacted a revenue sharing program for unincorporated communities that is nearly identical to the program as expanded by the commissioner on the advice of the Attorney General. J.A. 44. On September 3, 1985, the Native Village of Noatak, Circle Village, and the Native Council of Akiachak filed suit in the United States District Court for the District of Alaska against the Commissioner of the Department of Community and Regional Affairs for the State of Alaska. In the complaint, they challenged (1) the opinions of the Alaska Attorney General that AS 29.89.050, which provided revenue sharing only to unincorporated communities with a "Native village government", violated the Alaska Constitution, and (2) the subsequent expansion and administration of that revenue sharing program in conformity with the opinions. The plaintiffs sought both injunctive and monetary relief. J.A. 3-20.

The Native Village of Noatak is an unincorporated community that has a Native council organized under the

⁶ All monies appropriated for the program have been disbursed except for \$611.00, the amount to which the Native Village of Noatak would be entitled if it prevailed on the merits of this lawsuit. J.A. 47.

Alaska Native Reorganization Act, 25 U.S.C. § 473a. Circle Village is an unincorporated community founded in 1887 as a supply town for gold rush miners. Circle has both a Native council (the respondent), founded in 1970, and a multi-racial civic association. Both villages have populations made up of both Natives and non-Natives. Neither village occupies a reservation. CR 21, Ex. A-6; Pet. 3, n.2.

The District Court dismissed the complaint on the basis that the State of Alaska was immune from suit under the Eleventh Amendment, or alternatively, because no federal question was raised in the complaint. Pet. App A-1-14. The Native Village of Noatak and Circle Village (the Villages) appealed. J.A. 1. In March 1989, the Court of Appeals for the Ninth Circuit reversed the ruling of the District Court. *Noatak I*, 872 F.2d 1384. It held that the Villages are Indian tribes "duly recognized by the Secretary of the Interior" and that in this case 28 U.S.C. § 1362 overrode Alaska's sovereign immunity from suit in federal court without its consent. In February 1990, the Court of Appeals, while denying Alaska's petition for rehearing, withdrew its earlier opinion and substituted a revised opinion that likewise reversed the District Court ruling, albeit on different grounds. *Noatak II*, 896 F.2d 1157.

In *Noatak II*, the Ninth Circuit again ruled that the Villages are tribes for purposes of asserting jurisdiction under 28 U.S.C. § 1362. Unlike in its earlier decision, however, the Ninth Circuit then ruled that 28 U.S.C. § 1362 "did not strip the states of their immunity", Pet. App. B-12, because it did not abrogate that immunity unequivocally and textually. *Dellmuth v. Muth*, 109 S.Ct.

2397, 2401 (1989). Instead, the Ninth Circuit concluded that the States' consent to suit by Indian tribes in federal court was "inherent in the constitutional plan". Pet. App. B-18. Finally, the Ninth Circuit held that a federal question had been sufficiently alleged to warrant the exercise of federal jurisdiction. Pet. App. B-20-22. Judge Kozinski dissented from the latter determination on the ground that the Villages claims were "insubstantial" and "frivolous".⁷ Pet. App. B-25-26.

On October 1, 1990, this Court granted a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.⁸

⁷ The Court of Appeals concluded that when the Commissioner expanded the revenue sharing program, he did so after taking the race of the recipients into account, and that the process of considering race was itself a violation of the Fourteenth Amendment. The State's contention is that taking race into account in order to eliminate unequal benefits cannot violate federal law and so raises no federal question. See *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527, 538 (1982).

⁸ In our petition for a writ of certiorari, the State of Alaska argued alternatively that the Court of Appeals erred in concluding that federal question jurisdiction existed in this case. Although the State still believes the decision below to have been in error, upon further reflection we conclude that this issue does not merit plenary consideration and therefore do not address it here.

SUMMARY OF ARGUMENT

1. In this case, the Court of Appeals for the Ninth Circuit decided that no State has immunity from suit, including under the Eleventh Amendment, when brought by an Indian tribe in federal court because upon admission to the union each State waived its immunity by acceptance of the plenary authority of Congress "to regulate commerce with the Indian tribes." U.S. Const. Art. I, Sec. 8, cl. 3. The Ninth Circuit decision is contrary to this Court's decisions in *United States v. Minnesota*, 270 U.S. 183, 193-95 (1926) and *Arizona v. California*, 460 U.S. 605, 614 (1983). In addition, this Court has already rejected the argument that implied waivers of immunity can be found in the commerce clause. *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 489 (1987). Finally, history does not support the Ninth Circuit's decision.

At the time of the drafting and ratification of the United States Constitution, Indian tribes were not even able to bring suit in the federal courts. *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 (1831). Therefore, an implied consent to suit (or an implied waiver of sovereign immunity) by consenting to the plan of the Convention is neither logical nor supportable.

While Congress in the exercise of its authority under the commerce clause may abrogate a State's immunity by the enactment of legislation, *Welch, supra* and its progeny, the legislation must do so "unequivocally and textually". *Dellmuth v. Muth*, 109 S.Ct. 2397, 2401 (1989). Even the Ninth Circuit agrees that 28 U.S.C. § 1362 does not meet that standard. *Noatak II*, 896 F.2d at 1162. The Ninth Circuit's decision on the issue of sovereign immunity at

least partly undoes the balance of federalism that was struck in 1789 between the States and the United States; that decision should be reversed.

2. The State of Alaska believes that the Native Village of Noatak is a tribe. The State of Alaska believes that Circle Village is not a tribe. Irrespective of those beliefs, the Ninth Circuit's decision about tribal status in Alaska is a dramatic departure from existing law on recognition of tribal status. The dramatic departure is unjustified.

The Ninth Circuit decided that for purposes of 28 U.S.C. § 1362, the Native Village of Noatak is a tribe simply because it has organized under the Alaska Native Reorganization Act, 25 U.S.C. § 473a, and that for purposes of 28 U.S.C. § 1362, the Native Village of Noatak and Circle Village are tribes because they are listed as Native villages in the Alaska Native Claims Settlement Act, (ANCSA) 43 U.S.C. §§ 1601 et seq.⁹ Yet under the Alaska Native Reorganization Act, it is clear that

⁹ Some Native villages have argued that the Court of Appeals' decision means recognition of tribal status generally. See *Chilkat Indian Village v. Johnson, et al.*, No. J84-024 (U.S.D.C. Alaska); *Alyeska Pipeline Serv. Co. v. Native Village of Copper Center*, No. A87-201 (U.S.D.C. Alaska); *State of Alaska v. Native Village of Venetie*, No. F87-0051 (U.S.D.C. Alaska). If this view were accurate, it could lead to a substantial proliferation of new tribes in Alaska, thus posing a potentially significant impact in the State of Alaska. However, a later ruling by a different panel of the Ninth Circuit may have narrowed the use of the methodology to tribal status for purposes of 28 U.S.C. § 1362 alone. See *Native Village of Venetie v. State of Alaska*, ___ F.2d ___, No. 88-3929 (9th Cir. Nov. 6, 1990), slip op. at 13589.

non-tribal organizations with only "a common bond of occupation, or association, or residence . . ." may be organized. 25 U.S.C. § 473a. And in ANCSA, Native villages include such diverse entities as "any tribe, band, clan, group, village, community, or association in Alaska". 43 U.S.C. § 1602(c). The State of Alaska would agree that some groups organized under the Alaska Native Reorganization Act are tribes and some listed in the Alaska Native Claims Settlement Act are tribes. However, automatic recognition as tribes on the basis of organization under one or identification in the other, without any factual examination of their history and current status, is not justified. The Ninth Circuit's decision on this issue should also be reversed.

ARGUMENT

I. THE SOVEREIGN IMMUNITY OF THE STATES BARS A SUIT BY AN INDIAN TRIBE IN THE FEDERAL COURTS.

This Court has often considered the extent of the sovereign immunity of the States and the Eleventh Amendment that preserves it. The amendment precludes a federal court from adjudicating claims against a State, including those asserted by its own citizens. See *Edelman v. Jordan*, 415 U.S. 651 (1974); *Hans v. Louisiana*, 134 U.S. 1 (1890). However, the doctrine is subject to a number of exceptions that, under limited circumstances, allow the federal courts to adjudicate claims against States.¹⁰

¹⁰ For example, (1) a suit against a State by the United States, U.S. Constitution, Art. III, § 2, (2) a suit against a State

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This suit, which is against the State of Alaska and one of its commissioners in his official capacity, seeks money damages but no prospective relief.¹¹ Two distinct arguments have been advanced in support of the proposition that Indian tribes may sue a state in the federal courts.¹² The Court of Appeals for the Ninth Circuit held that each State waived its immunity from suit by an Indian tribe when that State agreed to the plan of the Union. *Noatak II*, 896 F.2d at 1161-65. In addition, the respondents argued below that 28 U.S.C. § 1362 was a Congressional abrogation of the States' sovereign immunity for suits by Indian tribes.¹³ Neither theory is sound.

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official in his or her official capacity brought to halt the enforcement of a State law which violates the federal constitution, *Ex Parte Young*, 209 U.S. 123 (1908), (3) a suit against a State that has waived its immunity, *Clark v. Barnard*, 108 U.S. 436 (1883); *United States v. Texas*, 143 U.S. 621 (1891), and (4) a suit against a State after Congress has specifically and expressly abrogated the immunity, e.g. *Dellmuth v. Muth*, 109 S.Ct 2397 (1989).

¹¹ The statute at issue here was repealed in 1985 and replaced that same year by a statute giving revenue sharing to all unincorporated communities. See pages 3-4, *supra*.

¹² Although the State of Alaska does not believe that Circle Village could qualify for tribal status under existing law, for purposes of this argument we will assume that both of the respondents are Indian tribes.

¹³ The Ninth Circuit adopted this rationale in *Noatak I* but upon reconsideration agreed that § 1362 was not intended to abrogate State sovereign immunity. *Noatak II*, 896 F.2d at 1162. The State of Alaska expects the respondents to make that argument again in this Court.

A. The States did not waive their sovereign immunity when they agreed to the constitutional plan of Union.

1. *The Intent of the Framers.* The immediate problem with the Ninth Circuit's theory of the States' implied consent to suits by Indian tribes upon entering the Union is that neither the Founding Fathers at the Convention in 1787 nor the members of Congress who in 1793 passed or the States that in 1795 ratified the Eleventh Amendment believed that Indian tribes could sue in federal courts at all. There was virtually no discussion of Indian issues at the Convention of 1787, and the original Constitution mentions Indians only twice, first to exclude most of them ("Indians not taxed") from the body politic (Art. I, § 2, cl. 3), and later to confer on Congress the power to "regulate commerce . . . with the Indian tribes" (Art. I, § 8, cl. 3).¹⁴ Indians are not mentioned at all in Article III, the article establishing the authority of the federal judiciary. Certainly, there is nothing to indicate any consciousness by the delegates that they were creating a waiver of a substantial State sovereign right. Finally, there is no discussion in the Federalist Papers even remotely indicating that the constitutional plan required that Indian tribes be able to sue the States without their consent.¹⁵

¹⁴ See, generally, Claiborne, "Black Men, Red Men, and the Constitution of 1787: A Bicentennial Apology by a Middle Templar", 15 Hastings Const. L. Rev. 269, 281-91 (1988).

¹⁵ By way of contrast, however, there is considerably historical evidence, both in the Federalist Papers and in the debates concerning the adoption of the Constitution, that under the new Constitution States were not amenable to suit in

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The power of Congress to regulate commerce with the Indian tribes does indicate a conscious concession by the States of one prerogative to the federal government, i.e., plenary power to legislate over Indian affairs. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). However, it does not even remotely suggest a waiver of the States' sovereign immunity. If it did, the federal monopoly on foreign affairs (created in part by the same Commerce Clause) presumably would also imply that foreign nations can sue States as well. This, of course, is not the law.¹⁶

Even less can be made of the clause that excludes "Indians not taxed" from State populations determined for purposes of apportioning representation in Congress. This provision could conceivably suggest a view of tribal Indians as distinct political communities, which in turn might support some degree of tribal sovereignty;¹⁷ however, the conclusion that a State's sovereign immunity was somehow surrendered simply does not follow from that premise. The status of foreign nations is again illustrative of that point. Even the most extreme proponent of

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federal court without consent. See Federalist No. 81, pp. 548-49 (J. Cooke ed. 1961) and 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 533, 555-56 (2d ed. 1961). See also *Welch v. Dep't of Highways and Public Transp.*, 483 U.S. 468, 480, n.10 (1987); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, n.2 (1985).

¹⁶ *Monaco v. Mississippi*, 292 U.S. 313 (1934). Cf. *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 489 (1987).

¹⁷ See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Indian sovereignty would not claim greater independence than that of foreign nations; yet foreign nations may not file an unconsented to suit against a State.

Chief Justice Marshall clearly explained the situation in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831):

At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the Constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union.

Justice Marshall concluded that "... the Framers of our Constitution had not the Indian tribes in view when they opened the courts of the union to controversies between a State, or the citizens thereof, and foreign States." 30 U.S. at 18.

In sum, history suggests that, far from removing State immunity in federal courts, the Founders never believed that the tribes had access to the courts in the first place.

The same is true for the members of Congress and the States which enacted and ratified the Eleventh Amendment. The amendment was passed with "vehement speed"¹⁸ to reverse the decision of the Supreme

¹⁸ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949) (Justice Frankfurter dissenting).

Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), permitting a suit against a State by a citizen of another State. This Court has consistently interpreted the enactment of the Eleventh Amendment as an affirmation of each State's sovereign immunity, including to suit by its own citizens.¹⁹ Again, there is no historical support for

¹⁹ See, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890). In *Hans*, this Court noted that the principles of federalism inherent in the original plan of the Constitution surely could not have contemplated suits and actions that were then unknown to the law:

The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those Articles. 131 U.S. App. 1. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 288, 289 [32: 239, 242, 243], and cases there cited.

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compulsory arbitration; Congress has also established a statutory scheme for such claims that is inconsistent with compulsory arbitration.

In enacting Title VII and the ADEA, Congress created a detailed and unique statutory scheme clearly aimed at eliminating discrimination in employment. *Alexander*, 415 U.S. at 44, 39 L. Ed. 2d at 155-56 (Title VII). The Equal Employment Opportunity Commission ("EEOC") was created with the authority to investigate and attempt to conciliate charges of discrimination. The EEOC is authorized to institute civil actions against employers or unions. No action can be maintained under either Title VII or the ADEA unless a timely charge is filed with the EEOC. Compulsory arbitration of Title VII and ADEA claims would conflict with this statutory scheme and undermine the role of the EEOC, the agency Congress created to handle these claims.

In addition, arbitration provides an inappropriate forum for employment discrimination claims, in part because of the way arbitration works, especially arbitration under the NYSE rules.³ Panels under the Rules are generally made up of a majority of "public arbitrators"

³ Since *Gilmer* brought this action, the NYSE has amended its rules. The amendments are reported at 54 Fed. Reg. 21144. Presumably the new rules would apply if *Gilmer* were to arbitrate his claim; therefore, this discussion will focus on the new rules. The changes with respect to disclosure of arbitration clauses would not apply to *Gilmer*, because he executed his agreement under the old rules. As will be demonstrated *infra*, the disclosure to *Gilmer* fell woefully short of the requirements under the new rules.

with certain ambiguous qualifications omitted from the constitutional provision." Abel, *supra*, at 467.²⁰ By contrast, the grant of power to Congress to regulate interstate and foreign commerce represented a dramatic increase in the powers that the national government enjoyed under the Articles of Confederation and was understandably the focus of considerable debate. Abel, *supra*, *passim*. In light of the fact that the power to regulate Indian affairs had already been conferred upon the national government under the Articles of Confederation, when there was no question of the amenability of a State to suit in federal court by Indians, or by anyone else, it is difficult to contend that the mere reaffirmation of that power in the Constitution – to which the Framers gave scant attention – turned out to be a waiver of the States' sovereign immunity. Against that background it would be truly remarkable to discover that when they ratified the Constitution the States were consenting to be sued by tribes in the federal courts.

2. *Judicial interpretation of State Immunity.* As noted above, the Supreme Court, through Chief Justice Marshall, declared unequivocally in 1831 that the Framers did not consider the federal courts to be open to suit by Indian tribes. Although the rights of Indian tribes and individual Indians have steadily increased since that

²⁰ The Articles of Confederation provided that "[t]he United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians not members of any of the states; provided that the legislative right of any State within its own limits be not infringed or violated". Articles of Confederation, art. 9, para. 4.

time, the Court has never departed from its ruling that the Constitution did not remove the States' immunity from suit by Indian tribes.

The proposition that suits by tribes against States is inherent in the constitutional plan is directly contradicted by the unambiguous statement of this Court in *United States v. Minnesota*, 270 U.S. 181, 194-95 (1926). There the Court dealt with the argument that the State's immunity from suit by a tribe foreclosed a like suit by the United States as their guardian. In rejecting that conclusion, the Court expressly endorsed the premise that "the Indians could not bring the suits . . ." 270 U.S. at 195. Given the basis of the claim (treaties and statutes running in favor of the tribe) and the remedy sought (a money judgment, the proceeds to be held in trust for the tribe), the reference to "the Indians" must be read as referring to the tribe, not the individuals. We thus have a clear declaration of the proposition – treated as beyond debate – that, absent consent or Congressional waiver, a State is immune from suit by an Indian tribe.²¹ *Accord*, *Arizona v. California*, 460 U.S. 605, 614 (1983).

²¹ There is additional support for the finding that there was no historical understanding of an implied Constitutional consent to suits by tribes against States in the fact that the federal courts were generally not open at all to Indians before 1924. 13B Wright & Miller, *Federal Practice and Procedure*, § 3622, p. 583 (2d ed. 1984). Before Indian citizenship was granted in 1924, Indians and tribes were able to sue in federal courts only by virtue of special jurisdictional statutes or by naturalization conferred by treaty or by Congress. See e.g. *Felix v. Patrick*, 145 U.S. 317, 330, 332 (1892).

prove. The NYSE Rules have no provision equivalent to Rule 26(b)(1) of the Federal Rules of Civil Procedure, which allows a party to discover "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The rules providing that depositions may be taken only at the discretion of the arbitrator, and the Rules' lack of provision for sanctions or other penalties for failure to comply with discovery requests, put an employment discrimination plaintiff at a severe disadvantage.

Another important difference between arbitration under the NYSE Rules and a judicial proceeding is that arbitration does not require the issuance of a written opinion. *See id.* at 21151. Of course, in a bench trial, the judge must set forth the relevant facts and the law as applied to the facts.

The absence of written arbitrators' opinions creates severe problems for age discrimination claimants. It makes appeal extremely difficult because the employee is unable to determine the grounds for the award. It is impossible to determine which facts the arbitrator considered determinative, which law the arbitrator applied, how the arbitrator applied the law, or even whether the arbitrator applied the law. In addition, the lack of a written opinion can hide a compromise award. Although this may be appropriate in routine contractual disputes, it is singularly inappropriate in employment discrimination cases, considering Congress' strong policy against discrimination in the workplace. *See, e.g.*, 29 U.S.C. § 621(b).

constitutional right, a distinction that was overlooked in *Parden*.²² The Court emphatically held that the mere fact of agreeing to the Commerce Clause did not amount to a waiver of State sovereign immunity, and that for Congress to abrogate that immunity required a clear textual declaration of that intent. Just as with the Commerce Clause as applied "among the several States", the same Clause as applied to commerce "with the Indian Tribes" contains nothing identifiable as consent, or as intending that State sovereign immunity be waived.²³

The Ninth Circuit decision put great emphasis on analogizing Indian tribes to States, the theory being that since tribes were present as "units of government" when

²² *Welch* held that, assuming Congress has the power to abrogate the States' Eleventh Amendment immunity, it must do so in unmistakably clear language. 483 U.S. at 478. Since then, any argument based on a claim of the States' consent to the Commerce Clause must be understood, not as an argument purporting to establish a *waiver* of Eleventh Amendment sovereign immunity, but rather as purporting to establish consent to the proposition that Congress has the authority to abrogate Eleventh Amendment immunity.

²³ A useful way to examine the question is to use the formula suggested in *Hans v. Louisiana*, 134 U.S. 1 (1890): Can one suppose that when the Eleventh Amendment was adopted, it was understood that Indian tribes were to be allowed to sue States in federal court, "whilst the idea of suits by citizens of other states or foreign states was indignantly repelled?" Likewise, can one suppose that the members of Congress who proposed the Amendment would have been willing to add to it a proviso that it did not apply to suits against States by tribes? As the Court stated in *Hans*, the supposition that Congress would have "is almost an absurdity on its face." *Hans v. Louisiana*, 134 U.S. at 14.

the Union was formed, the framework of the Constitution must imply the same right of access to federal courts against States as that of the States themselves. Apart from the contrary historical evidence of the Framers' intentions, the analogy of tribes to States runs counter to this Court's own recent analysis. For example, in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), this Court rejected the theory that the Commerce Clause requires that a tribe be treated as a State for purposes of determining how State taxes and tribal taxes on reservation activity should be apportioned. The central purpose of the Commerce Clause's reference to Indian tribes, it held, was to provide Congress with plenary power in the field of Indian affairs, and is not justification for extending the unique place of the States in the constitutional system to tribes.

An appropriate analogy comes by comparing suits by Indian tribes against States with suits by foreign states against States. The unassailable conclusion is that State sovereign immunity applies in both cases. To avoid this result, it is argued that tribes are more like the United States in that they are "domestic" nations. But this makes no constitutional sense. As far as its powers go, the United States is the supreme sovereign, whose laws override those of the States with no territorial limitation. That is the essence of the Supremacy Clause. But no comparable claim can be made for any Indian tribe. Even the limited reach of tribal law is geographically confined and its qualified "supremacy" within reservation boundaries is subject to complete defeasance by the United States.²⁴

²⁴ See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141, 149 (1982); *Escondido Mutual Water Co. v. La Jolla Bands*

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In light of this constitutional principle, it is absurd to pretend that the United States and Indian tribes are comparable.²⁵

There is no persuasive evidence, historical or otherwise, that the principles of federalism inherent in the plan of the Constitution require that Indian tribes be able to sue a State in federal court without its consent.²⁶ If it is true that those inherent principles compel the conclusion that a State has consented to such suits, this consent should not be construed as automatic, but rather that

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of *Mission Indians*, 466 U.S. 765, 788 (1984); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198 (1985).

²⁵ We also note that neither considerations of fairness nor the principles of federalism support the historical argument. Unlike States, Indian tribes generally enjoy sovereign immunity from suits by States. *Puyallup Tribe v. Washington Game Dep't*, 433 U.S. 165, 172-73 (1977). Equity suggests that at a minimum, immunity be mutual, not the one-way waiver of immunity suggested by the Ninth Circuit. Indeed, if the constitutional plan does imply that the federal courts are open to suits against States by tribes, it may also imply the converse, unless the Indian tribes are somehow more "sovereign" than the States. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 24 (1987) (Justice Stevens concurring in part and dissenting in part); cf. *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n*, 888 F.2d 1303 (10th Cir. 1989), cert. granted, ___ U.S. ___ (October 1, 1990).

²⁶ Such a result is historically and legally unnecessary, since the United States, as trustee for Indian tribes, has always had the authority to initiate litigation against a State on behalf of a tribe. See *Moe v. Confederated Kootenai and Salish Tribes*, 425 U.S. 463, 473 (1976).

Congress has the power to abrogate that immunity. As this Court stated in *Edelman v. Jordan*, 415 U.S. 651 (1974):

Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

415 U.S. at 673, citations omitted.

Thus we are back to the rule announced by this Court in *Welch v. Dep't of Highways and Public Transp.* 483 U.S. 468 (1987); *Atascadero State Hospital v. Scanlon*, 437 U.S. 234 (1985), *Dellmuth v. Muth*, 105 L.Ed.2d 181 (1989), and most recently in *Hoffman v. Connecticut Dep't of Income Maintenance*, 106 L.Ed.2d 76 (1989). This rule simply states that since abrogation of sovereign immunity upsets "the fundamental constitutional balance between the federal government and the States," Congress may abrogate a State's immunity from suit only by making its intent to do so unmistakably clear. So the only remaining question is whether Congress ever expressed such an intention when it authorized suits by tribes in 28 U.S.C. § 1362.

C. Congress did not intend 28 U.S.C. § 1362 to abrogate the sovereign immunity of the States.

Congress can abrogate a State's sovereign immunity but must do so expressly and with clear intent. *Dellmuth v. Muth*, 105 L.Ed.2d 181 (1989); *Atascadero State Hospital*

v. Scanlon, 473 U.S. 234, 243 (1985).²⁷ The decisions of this Court directly and conclusively support the position of the petitioner regarding 28 U.S.C. § 1362.

A careful reading of that statute reveals no such Congressional intent. 28 U.S.C. § 1362 states:

The district courts shall have original jurisdiction of all civil actions, brought by any

²⁷ In *Dellmuth*, Justice Kennedy wrote on behalf of the Court:

Our opinion in *Atascadero* should have left no doubt that we will conclude Congress intended to abrogate sovereign immunity only if its intention is "unmistakably clear in the language of the statute." *Atascadero*, *supra* at 242. Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of the law, evidence of Congressional intent must be both unequivocal and textual. Respondent's evidence is neither. In particular, we reject the approach of the Court of Appeals, according to which "[w]hile the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress' intention to lift the bar has been made sufficiently manifest." 839 F.2d at 128. Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is "unmistakably clear in the language of the statute," recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met.

105 L.Ed.2d at 189; accord *Pennsylvania v. Union Gas Co.*, *supra*; *Will v. Michigan Dep't of State Police*, 105 L.Ed.2d 45 (1989).

Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Precisely like the Education of the Handicapped Act ruled on by the Supreme Court in *Dellmuth v. Muth*, *supra*, 28 U.S.C. § 1362 "makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity . . . [n]or does any provision cited. . . . address abrogation in even oblique terms, much else with the clarity *Atascadero* requires." 105 L.Ed.2d at 190. Thus, no abrogation of the States' sovereign immunity can be read into 28 U.S.C. § 1362.

The best parallel to this case is *Welch*, in which this Court considered whether the Jones Act abrogates the Eleventh Amendment so as to permit federal suits against a State by its own citizens. The Jones Act broadly permits suits against employers by "any seaman who shall suffer personal injury in the course of his employment" (emphasis added by the Court). The Court ruled that the Eleventh Amendment was not abrogated by the Jones Act, because Congress did not express its intent in unmistakable and unequivocal statutory language. The use by Congress of the phrase "any seaman" was insufficient:

. . . [T]he Eleventh Amendment marks a constitutional distinction between the States and other employers of seamen. Because of the role of the States in our federal system, '[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.'

483 U.S. at 475-76 (citations omitted). The Court explicitly disavowed *Parden v. Terminal Railway*, 377 U.S. 184 (1964), in which an abrogation of the Eleventh Amendment was inferred from language making a statute applicable to "every common carrier by railroad." Instead this Court adopted the position of the dissent in *Parden*:

It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another. Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense.

483 U.S. at 477, citing 377 U.S. at 198-99 (White, J., dissenting). *Accord*, *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279 (1973).

The *Welch* ruling fits this case squarely. Nowhere in 28 U.S.C. § 1362 is there an express unequivocal statement of Congress's intent to abrogate the Eleventh Amendment. The statute mentions neither States nor abrogation. 28 U.S.C. § 1362 is precisely the kind of general authorization to bring suit as is contained in the Jones Act and in the statute at issue in *Parden*. As in those cases, Congress used its constitutional authority to create a judicial remedy, but as this Court held, a general authorization to bring suit cannot by itself be used to abrogate the Eleventh Amendment. The abrogation must be explicit, and since there is no explicit declaration of intent

to abrogate in § 1362, the Eleventh Amendment remains as a bar in this case.²⁸

The respondents have previously argued that a passage in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), "authoritatively" construed 28 U.S.C. § 1362 as an abrogation of the States' sovereign immunity. The question before the Court was whether § 1362 exempted Indian tribes from the Anti-Injunction Act, 28 U.S.C. § 1341, which prohibits the district courts from enjoining State taxes. The Court held that because the United States could have maintained the same action as the tribe's trustee, so could the tribe. *Moe*, 425 U.S. at 473. The respondents have argued elsewhere that because the

²⁸ If 28 U.S.C. § 1362 were held to be an abrogation of the Eleventh Amendment, it would be unique among federal jurisdictional statutes. Eleventh Amendment immunity is not abrogated by 28 U.S.C. § 1331, 28 U.S.C. § 1343, or 28 U.S.C. § 1353 (Indian allotment claims). *Aguilar v. Kleppe*, 424 F. Supp. 433 (D. Alaska 1976). The same is true for suits under 28 U.S.C. § 1333 (admiralty jurisdiction). *Ex Parte New York*, 256 U.S. 490 (1921); *Red Star Towing v. Connecticut*, 431 F. Supp. 1003 (D. Conn. 1976). The few cases in which the Eleventh Amendment was found not to bar jurisdiction under § 1362 are where there was clear preemption of the State's right to regulate the subject, or are mere dicta, and they all predate *Welch*. See, e.g., *Lac Courte Oreilles Band v. Wisconsin*, 595 F. Supp. 1077 (W.D. Wisc. 1984) (treaty rights); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (reservation immunities); *Oneida Nation v. New York*, 691 F.2d 1070 (2d Cir. 1982). On the other hand, the Eighth Circuit Court of Appeals has confirmed that the Eleventh Amendment is a bar to suits under § 1362, in spite of Indian tribal status. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974).

United States can sue States notwithstanding the Eleventh Amendment, this passage is an authoritative holding by the Court that tribal suits are not barred by States' sovereign immunity. The contention is incorrect and reads entirely too much into a case arising in another context.

Moe had nothing to do with the sovereign immunity of the States. It dealt with a statutory bar to a particular remedy, not with a basic right of sovereign States safeguarded by a Constitutional amendment. Moreover, the Court made it clear that under 28 U.S.C. § 1362, a tribe's right to sue was *not* identical with that of the United States. This Court stated that "the legislative history of § 1362, though by no means dispositive, suggests that *in certain respects* tribes suing under this section were to be accorded treatment *similar* to that of the United States had it sued on their behalf." 425 U.S. at 474. (Emphasis added.) There is no authority for the proposition that an Indian tribe may simply take the place of the United States government whenever the tribe wishes to litigate with a State. Neither *Moe* nor § 1362 offers any support for such a theory.²⁹

²⁹ The legislative history of 28 U.S.C. § 1362 indicates that it was enacted in order to facilitate tribes' access to the federal courts by eliminating the jurisdictional amount requirement then existing in 28 U.S.C. § 1331. H.R. Report 2040, 89th Cong. 2d Sess., 1966 U.S. Code and Cong. and Ad. News 3145-3149. While it seems that Congress intended to give tribes the ability to sue private parties when the United States is unable or unwilling to do so, there is no indication that Congress intended to permit Indian tribes to bypass the United States' role as trustee when the constitutional rights of States were involved.

The sovereign immunity of the State of Alaska should be held to bar this action.

II. THE COURT OF APPEAL'S NOVEL APPROACH TO TRIBAL STATUS IS CONTRARY TO EXISTING LAW.

The Court of Appeals decided that the respondents were Indian tribes for jurisdictional purposes under 28 U.S.C. § 1362. In so doing, the court used a new method for determining tribal status. When an Indian group is not on the Secretary of the Interior's list of acknowledged tribes, as respondents are not,³⁰ existing law requires a factual examination using either the criteria in the Federal Acknowledgment Process, 25 CFR Part 83,³¹ or

³⁰ The Secretary of the Interior maintains a list of recognized tribes in the contiguous 48 States and a separate list of "Native Entities within the State of Alaska Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 53 Fed. Reg. 52832-52835 (December 29, 1988). The latter list, as explained in its preamble, is an all-inclusive list which goes well beyond historical tribes and includes many organizations, such as State-chartered corporations formed pursuant to the Alaska Native Claims Settlement Act, which have no claim to tribal status and other modern voluntary organizations which do not meet the criteria for tribal status.

³¹ 25 C.F.R. Part 83 sets out a test for tribal recognition that examines factors such as continuous historical existence, i.e., exclusion of groups formed in modern times; continuous political authority of the tribe over its members throughout history; inhabiting an area and maintaining an identity distinct from others in the area; and existence of presently functioning political structures. These factors roughly parallel the criteria developed through the case law.

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similar criteria in case law.³² Neither the Court of Appeals nor the District Court made such a factual examination.

Instead, the Court of Appeals concluded that a group was a tribe if it either (a) is organized under the Alaska Native Reorganization Act, 25 U.S.C. § 473a, or (b) is identified as an Alaska "Native village" in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq. Neither method is appropriate for determining tribal status.

The State of Alaska believes that the Native Village of Noatak would meet all the criteria in federal law for recognition as a tribe; at the same time, the State of Alaska believes that Circle Village could not so qualify. Our concern is that the use of the Ninth Circuit's methodology for determining tribal status would allow organizations like the Circle Village Council to claim tribal status despite being unable to meet the standards in existing law. There are in Alaska some 200 rural communities, outside of any Indian reservation, with significant

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It is undisputed that the federal government has never recognized the tribal status of any Alaskan Native groups under Part 83.

³² See, e.g., *United States v. Mazurie*, 419 U.S. 544 (1975); *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979). See also *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988), in which the Alaska Supreme Court concluded that off-reservation Alaska Native villages cannot qualify as tribes because of their lack of sovereign powers.

Native populations. Some are traditional, predominantly Native communities with active Native councils; others have only a minority of Natives among the population, are not traditional Native communities, and lack active Native councils or other indicia of tribal status. Yet the Native residents of all such communities, no matter what factual variations exist, would achieve automatic tribal status under the Court of Appeals ruling, at least for purposes of 28 U.S.C. § 1362.

A. Organization under the Alaska Native Reorganization Act is not proof of tribal status.

The Court of Appeals concluded that Noatak is a tribe because it has a governing body organized under the Indian Reorganization Act. That act (the "IRA"), at 25 U.S.C. § 476, authorizes tribes to organize and adopt constitutions approved by the Secretary of the Interior. As originally enacted, the IRA applied only to tribes in the lower 48 states; since only tribes could qualify, it was a reasonable conclusion that entities with approved IRA constitutions were in fact tribes.

But the logic fails when applied automatically in Alaska. When Congress extended the provisions of the IRA to cover Alaska Natives in 1936,³³ it explicitly broadened the definition of eligible entities beyond tribes to include

groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but

³³ Act of May 1, 1936, 49 Stat. 1250, 25 U.S.C. § 473a (the Alaska Native Reorganization Act).

having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district, may organize to adopt constitutions . . . under sections 470, 476, and 477 of this title.

25 U.S.C. § 473a (emphasis added). This provision makes two points clear: Congress did not consider Alaskan Indian groups to have already been accorded tribal status, and Congress intended to extend the benefits of organization under the IRA to groups that were not tribes. Hence groups of Indians who merely lived in the same neighborhood or had a common occupation could organize under the IRA.³⁴ Congress obviously intended to facilitate the organization of Alaska Natives so that they could secure loans and other economic benefits, despite their lack of tribal status.³⁵ If Congress had intended that only tribes qualify for IRA constitutions in Alaska, it could have simply added Alaska Natives to the existing eligibility criteria. The broadening language cited above makes sense only if Congress intended non-tribal groups to qualify as well as tribal groups.³⁶

³⁴ In fact, the language as to eligible groups was borrowed by Congress from the Federal Credit Union Act, 12 U.S.C. § 1759, passed a short time earlier, and describing affinity groups eligible to establish credit unions. See Cohen, *Handbook of Federal Indian Law* at 414, n. 209.

³⁵ Congress also permitted organized groups of Alaska Natives to qualify for economic development funding, 25 U.S.C. § 470.

³⁶ In fact, non-tribal groups did make use of the provision: several fishermen's cooperatives organized under the Alaska Native Reorganization Act, as did groups citing a common

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The fact that the Alaska Native Reorganization Act allows the organization of groups with little more than a voluntary affinity as well as historical tribes is evidence that it was never intended as an alternate method for achieving tribal recognition. Organization under the Alaska Native Reorganization Act varies from existing law on tribal acknowledgment in other ways as well. Under it, an Indian can be a member of several IRA groups simultaneously. However, under the federal rules for tribal acknowledgment, an Indian can be a member of only one tribe. 25 C.F.R. § 83.7. Under the tribal acknowledgment rules, tribes must be historical entities with unbroken histories of activity as a tribal government, 25 CFR 83.7; under the Alaska Native Reorganization Act, modern voluntary organizations can qualify. Hence there can be as many IRA organizations formed as there are affinities under the language cited above, including modern voluntary organizations not successors to any traditional political groups.

According to Cohen, that is precisely what happened in Alaska. Some Native groups organized along geographical lines as political groups, while

[o]thers, especially in predominantly non-Native communities where municipal activities were already provided, consisted of all the Natives in an area organized solely for business purposes. Still others included persons with a

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bond of residence in an area, and groups which identified themselves as merely "associations" of Alaska Natives. See R.M. Farring, "Constitutions and the IRA in Alaska," Educational Services Institute (1985).

common bond of occupation, such as cooperatives composed of fishermen in an area.

Cohen, *Handbook on Federal Indian Law* at 751. Such groups do not qualify for tribal status under existing case law. *United States v. Mazurie*, 419 U.S. 544 (1975).³⁷

In short, tribes may organize under the Alaska Native Reorganization Act, but so may other non-tribal organizations, so the fact of such organization does not itself signify tribal status.³⁸

³⁷ See also *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979).

³⁸ The decision of the Court of Appeals for Ninth Circuit in this case is the second of three recent decisions by separate panels of that court on the test for achieving tribal status by Alaska Native groups. In the first case, another panel of the court rejected the same logic that the panel in this case adopted. In *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988), the court stated:

Contrary to appellants' contention, this court's decision in *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986), did not hold that organization under the IRA is conclusive evidence of tribal status. In *Price*, the court merely stated that tribal status would be arguable in the event of IRA organization. *Id.* at 626. Also, amici have noted that the language of the IRA's Alaska amendment, 25 U.S.C. § 473a, raises doubt as to whether IRA organization should be construed so conclusively in the case of Alaska Natives. Furthermore, much uncertainty exists concerning the structure of [the Native villages in that case] that may have an impact on the IRA analysis.

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B. Designation as a "Native village" in the Alaska Native Claims Settlement Act is not tantamount to recognition as a tribe.

The Court of Appeals found that both Villages are tribes because they are listed as "Native villages" in the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1610(b)(1). Congress intended ANCSA, 43 U.S.C. § 1601, et seq., as a settlement of the land claims of Alaska Natives.³⁹ Nowhere in the Act is there any attempt to define the political organizations of Alaska Natives, nor is there even any mention of the concept of tribes. Congress chose not to use existing Native councils, including the respondents, as recipients of the land and money benefits under the Act, but instead established State-chartered corporations for each "Native village."⁴⁰

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856 F.2d at 1387. Finally, in a case decided after certiorari had been granted in this case, a third panel of the Ninth Circuit ruled that Native villages in Alaska may be tribes, but must demonstrate a relationship or connection with an historical political body, particularly one which existed before subjugation by non-Natives. *Native Village of Venetie v. State of Alaska*, ___ F.2d ___, No. 88-3929 (9th Cir. Nov. 6, 1990), slip op. at 13600-13601. The court cited the factors in 25 C.F.R. Part 83 for tribal recognition as "mirrors" of the test it offered (slip op. at 13601, n.11). As to the test used by the panel in the instant case for tribal status, the later panel merely noted it as "factors which a court may consider" to determine whether an Indian group may invoke jurisdiction under 28 U.S.C. § 1362 (slip op. at 13589).

³⁹ 43 U.S.C. § 1601(a).

⁴⁰ The villages' ANCSA assets were subject to rules not normally applicable to tribal assets: they were held by

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Indeed, when Congress passed the most recent series of amendments to ANCSA, it explicitly disclaimed any intent to validate claims of sovereign authority by Alaska Native groups (P.L. 100-241, § 17(a), 101 Stat. 1788).

Congress defined "Native villages" in the broadest possible way:

"Native village" means any tribe, band, clan, group, village, community, or association in Alaska.

43 U.S.C. § 1602(c). Congress clearly intended the category of "Native village" to include Native groups that could not claim tribal status; the concept of tribal status is not even mentioned in the Act. Congress' choice not to designate the Native villages as tribes makes sense in view of the wide variety of fact situations in the Native communities of Alaska because Natives comprise different percentages of the population in their communities, because those communities contain a mixture of traditional and modern settlements, and because there is a wide contrast in the extent to which the Natives in each community have Native political institutions.

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State-chartered corporations subject to State law, not held in trust but freely alienable at the corporation's discretion [43 U.S.C. §§ 1605, 1606, 1607]; were taxable by the State and local governments after an initial period or upon development [§ 1620]; and were not made subject to any tribal powers or authorities. Moreover the Act abolished every reservation in Alaska except the Annette Island Reserve, which chose not to participate in the settlement [§ 1618].

The Court of Appeals erred in using the ANCSA list of "Native villages" as a substitute for the tribal recognition process that applies throughout the rest of the United States. Although most Alaska Native villages probably would qualify as tribes under that process, the ruling below would elevate to tribal status some villages which may well not qualify.⁴¹

⁴¹ The Court of appeals also suggested that tribal status could be inferred from the fact that Congress has treated Alaska Native villages as if they were tribes for purposes of certain statutory programs, i.e., the Indian Self-Determination Act, 25 U.S.C. § 450b(e); the Indian Financing Act, 25 U.S.C. § 1452(c); and the Indian Child Welfare Act, 25 U.S.C. § 1903(8). While treatment of Indian groups as tribes by Congress is one factor in determining tribal status, the Court of Appeals ignored the fact that each of the cited statutes is prefaced with the phrase "for the purposes of this chapter."

It also ignored the fact that there are federal statutes in which Congress has explicitly excluded off-reservation Alaska Native villages from programs available to Indian tribes, e.g., the Clean Water Act, 33 U.S.C. §§ 1377(g), (h) and the Resource Conservation and Recovery Act, 42 U.S.C. § 6903(13)(A). See also the Indian Tribal Governmental Tax Status Act, 26 U.S.C. § 7701(a)(40)(A), in which Congress identified Alaska Native villages as tribes only if they exercised "substantial governmental" duties. In short, Congress deferred the determination of tribal status pending evaluation of the actual role of particular villages.

Finally, the Court of Appeals overlooked the fact that some of the federal statutes identified as conferring tribal status also designate some Alaska Native organizations, like ANCSA village and regional corporations, as tribes when they undisputedly are not, in order to extend federal benefits or programs to them. See, e.g., the Indian Self-Determination Act and the Indian Financing Act, *supra*.

The ruling also precludes the District Court from doing the detailed fact-finding usually necessary for a finding of tribal status. The case law and 25 C.F.R. Part 83 are completely adequate to enable the courts to make this determination, and, should jurisdiction be found, this case should be remanded to the District Court for that determination. It should not have been automatically made by the Ninth Circuit.

CONCLUSION

For all the reasons argued above the District Court lacked jurisdiction over this case. The decision of the Court of Appeals should be reversed and that of the District Court affirmed.

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APPENDIX

**PRINCIPAL CONSTITUTIONAL PROVISIONS
AND STATUTES INVOLVED**

Article I, Section 8, clause 3 of the United States Constitution states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

Article III, Section 2 of the United States Constitution states in relevant part:

The judicial power shall extend to all cases, in law, and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; - to all cases affecting ambassadors, other public ministers and consuls; - to all cases of admiralty and maritime jurisdiction; - to controversies to which the United States shall be a party; - to controversies between two or more states; - between a state and citizens of another state; - between citizens of different states; - between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

The Eleventh Amendment to the United States Constitution states:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602(c)) states:

App. 2

"Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives.

Section 1 of the Alaska amendments to the Indian Reorganization Act (25 U.S.C. § 473a) states:

Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

28 U.S.C. § 1362 states:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Don't miss it.

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COUNTERSTATEMENT OF THE CASE

This controversy arises out of the refusal of Alaska's executive branch to deal with Alaska Native villages as "Indian tribes" rather than racially-defined groups. In 1980 the Alaska Legislature, in recognition of the *tribal* status of Native villages, enacted a revenue-sharing statute providing for annual payments of \$25,000 to each "Native village government" located in a community without a state-chartered municipal corporation. The term "Native village government" was defined to include tribes organized under the 1934 Indian Reorganization Act (25 U.S.C. § 476) ("IRA"), "traditional village council[s]," "paramount chief[s]," or other governing bodies of the villages listed in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601, *et seq.* ("ANCSA"). ALASKA STAT. § 29.89.050 (1984) (reproduced in Petitioner's Brief at 2-3 n.2). Respondents Noatak and Circle fell within the class of tribal governments benefited by the Legislature.¹

In opinions issued in 1981 (J.A. 20-34), the Alaska Attorney General asserted that such Native village governments are not federally recognized Indian tribes, but rather "racially exclusive group[s]" or "racially exclusive organization[s]" whose status turns solely "upon the racial ancestry of the communities." J.A. 24, 25, 28, 30. In reliance on this characterization, the Attorney General informed the Commissioner of Community and Regional Affairs (petitioner) that providing state aid to village governments violated equal protection guarantees and various provisions

¹ The Native Village of Noatak is a remote Inupiat Eskimo village of some 273 people (94.9% Native) located in Northwest Alaska above the Arctic Circle, along the Noatak River inland from Kotzebue Sound and the Chukchi Sea. It has a government reorganized under the IRA. Noatak's tribal constitution under the IRA was approved by the Secretary of the Interior on December 28, 1939. Respondent Circle Village, which is filing its own brief, has a traditional council form of government. Both governments are situated in villages which are not incorporated as state-chartered municipalities, and both villages are named in section 11(b)(1) of ANCSA as beneficiaries of the settlement of Native land claims. 43 U.S.C. § 1610(b)(1).

of the Alaska Constitution. Petitioner acted on the Attorney General's advice and expanded the program to include unincorporated communities that did not have tribal governments. As a result, the Native village governments' pro-rata shares of the fund appropriated by the Legislature were reduced.²

Respondent and two other Native villages brought this action in September 1985 to challenge the State executive branch's treatment of their tribal governments as racial groups and its rejection of their federally recognized status as political bodies. The villages sought declaratory and injunctive relief, together with an order requiring the Commissioner to pay them and all similarly affected village governments the money they would have received but for the administrative expansion of the program.³

District Judge Holland granted the villages a preliminary injunction to preserve sufficient fiscal year 1986 revenue-sharing funds (the last year of funding under the 1980 statute before it was legislatively amended to conform to the opinion of the Attorney General)⁴ to make up for the

² The Commissioner has contended throughout the litigation, as he does here (Pet. Br. at 3-4), that no village suffered as a result of his decision to administratively expand the program because the Legislature funded the expanded program as fully as it would have funded the program had it been confined to Native village governments. Respondent alleges, however, that its entitlements were diminished by the Commissioner's action. The courts below did not deal with this issue, which goes to the merits of respondent's claims.

³ Although the complaint prayed for class-wide retroactive relief (approximately 50 villages were in the purported class), the motion for class certification was denied after the State volunteered to treat all similarly situated villages in accordance with any judgment that might be rendered. See *Order Granting Preliminary Injunction*, App. at 14a, to Brief in Opposition to Certiorari. The maximum Noatak could recover for the shortfalls during 1983-1986 is \$13,140.15. See *id.* at 17a and 19a. Petitioner is voluntarily holding \$611 as the amount which the State calculates Noatak would be due for fiscal year 1986 should Noatak prevail in this action. See *id.* at 24a.

⁴ In 1985, the Legislature amended the revenue-sharing statute (effective commencing with the 1987 State fiscal year) to conform to petitioner's

dilution in funding. App. A to Brief in Opposition to Certiorari, at 1a-16a. The court noted that "the State has consistently characterized the 'Native village government' rubric as being a racially tainted term. The court has substantial doubts that this characterization is appropriate." *Id.* at 12a. Ultimately, however, the court (per Judge Kleinfeld, to whom the case was reassigned) dismissed the entire case on alternative jurisdictional grounds: (1) the State's immunity from suit under the Eleventh Amendment, which has not been overcome by 28 U.S.C. § 1362; (2) the complaint's failure to present federal questions sufficiently substantial to invoke the subject matter jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1362.⁵ Pet. App. at A5-A14. Even the villages' Fourteenth Amendment equal protection claim, which the court acknowledged to be "the hardest" (*id.* at A11), was "patently without merit." *Id.* at A12. The court found it unnecessary to decide whether, within the meaning of 28 U.S.C. § 1362, respondents Noatak and Circle Village are Indian tribes or bands with governments duly recognized by the Secretary of the Interior. *Id.* at A8 ("That question is a close one").

The Ninth Circuit reversed the district court's jurisdictional rulings. In its initial opinion in March 1989, 872 F.2d 1384, the court held that Noatak and Circle Village are duly recognized Indian tribes under 28 U.S.C. § 1362 (J.A. 71-73); that, assuming the Eleventh Amendment's applica-

administrative expansion of the program, thus statutorily providing aid to all unincorporated communities regardless of the presence of a Native village government. ALASKA STAT. § 29.60.140 (1986). Respondents have never claimed that Alaska has any legal duty to aid federally recognized tribes (see Pet. App. at A12), only that if as a matter of policy it chooses to do so, such aid may not be denied on the basis of race, nor on the ground that tribes are not political bodies under federal law; and that any contrary state policy or law which denies their political status and classifies them by race must fall.

⁵ In addition to general federal-question (§ 1331) and Indian-tribe (§ 1362) jurisdiction, the complaint also alleges civil-rights jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. J.A. 4. The courts below have confined their jurisdictional analyses to §§ 1331 and 1362, and we do likewise here.

bility to suits by Indian tribes (J.A. 70-71), Congress has abrogated the states' immunity by the 1966 enactment of § 1362 (J.A. 73-77); and that the villages' federal claims are substantial ones, thereby conferring subject-matter jurisdiction. J.A. 77-78. Judge Kozinski dissented solely with respect to the "substantiality" issue. J.A. 79-83. In its amended opinion filed in February 1990, 896 F.2d 1157 (denying rehearing and rehearing *en banc*), the court, relying on intervening decisions of this Court, held the Amendment simply inapplicable to suits by Indian tribes. Pet. App. at B12-B20. Judge Kozinski continued to dissent on the issue of the substantiality of the villages' federal claims. Pet. App. at B22-B27.

This Court granted review of the three issues presented by petitioner: (1) whether the Eleventh Amendment bars suits against states brought by Indian tribes; (2) whether respondents are Indian tribes for the jurisdictional purposes of § 1362; and (3) whether any substantial federal question has been presented. Petitioner has now abandoned the third issue (*see* p. 6, *infra*), and has partially reversed his position on the second issue by conceding that respondent Noatak is indeed a tribe, though not "duly recognized" within the purview of § 1362. *See* p. 11, *infra*.

SUMMARY OF ARGUMENT

1. Respondent's complaint raises substantial federal questions conferring subject-matter jurisdiction upon the district court. To be satisfied with this proposition, the Court need look no further than (1) respondent's claim to be a federally recognized Indian tribe which federal law forbids the State to treat as a racially-defined non-sovereign group, and (2) the claim under the Fourteenth Amendment that petitioner has denied the Tribes equal protection of the laws by depriving them of State benefits on the basis of the race of their members. These claims are neither patently without merit nor obviously foreclosed by precedent; on the contrary, they find substantial support in the decisions of this Court.

2. The issue of Noatak's status as a "duly recognized" Indian tribe authorized to invoke federal-court jurisdiction under 28 U.S.C. § 1362 is easy. Petitioner now concedes that Noatak is a tribe, leaving the Court to ask only whether the Tribe has been duly recognized by the Secretary of the Interior. Manifestly, it has. First, Noatak was recognized over a half-century ago when the Secretary approved its self-governing constitution under the Indian Reorganization Act. That recognition has never been revoked. Second, the Tribe, along with Circle Village, is currently on the Secretary's published lists of tribes eligible for federal protection, services and programs "available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes." 25 C.F.R. § 83.2. Aside from these explicit acts of Secretarial recognition, Congress has recognized Noatak and Circle as tribes, leaving the Secretary without discretion in the matter, as the court of appeals correctly held. Pet. App. at B9.

3.(a) The Eleventh Amendment is aimed at suits against states by individuals and "private parties." Indian tribes, always viewed and treated under the constitutional plan as "domestic dependent nations," therefore do not fall within the scope of the Amendment's intended coverage. Nor do tribes come within the reasons for the Court's single extension of Eleventh Amendment immunity to bar suits by non-private parties, namely, foreign states. In the Constitution, the states plainly surrendered their immunity from suit by the United States on behalf of tribes, and the states otherwise surrendered to the Nation all of their sovereign authority over Indian affairs and relations. Suits by Indian tribes against states are thus "inherent in the plan of the convention."

(b) In the alternative, 28 U.S.C. § 1362 authorizes tribes to sue states. The statute has been so construed by this Court, and that determination satisfies the Court's "clear statement" requirement for congressional overrides of the Eleventh Amendment. Even if the Court's authoritative construction of § 1362 were deemed inadequate under the "clear statement" rule, the rule is inapplicable to the unique

circumstances of § 1362, enacted in 1966 under the standards of *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), which establishes the "contemporary legal context" for assessing the statute's effect on Eleventh Amendment immunity. More fundamentally, neither the Eleventh Amendment nor its "clear statement" rule applies to this special situation of a trust relationship between tribes and the United States, in which the national government can and does sue states on behalf of tribes. The "fundamental balance" of federal/state relations, which sovereign immunity and the "clear statement" rule are designed to serve, is not disturbed by a congressional delegation to tribes to invoke the same degree of federal judicial power against the states as the United States already exercises in its capacity as tribal trustee. The reason for state immunity and the "clear statement" rule is therefore absent, and § 1362 must be given its ordinary operative effect.

ARGUMENT

I. RESPONDENT'S CLAIMS ARISE UNDER FEDERAL LAW AND PRESENT SUBSTANTIAL FEDERAL QUESTIONS

Although petitioner has abandoned his challenge to the substantiality of the federal questions asserted by respondent, Pet. Br. at 6 n.8, we briefly address the issue at the outset (should the Court choose not to ignore it) because it is a threshold question of subject-matter jurisdiction.⁶

⁶ The Eleventh Amendment defense, which petitioner has not abandoned in his briefing, also has a jurisdictional dimension, in that it "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 677 (1974). But unlike a defect in subject-matter jurisdiction, the defense of state sovereign immunity may be waived by express consent to suit, e.g., *Port Authority Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868 (1990), and the federal courts are not required to raise the issue *sua sponte*—indeed, the defense may be withheld or invoked at the will of the State. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 515-16 n.19 (1982). Under the Court's precedents, therefore, it appears that federal subject-matter jurisdiction must be established before the Eleventh Amendment issue can be resolved. See also Pet. App. at B22 (Kozinski, J., dissenting).

Only if an action is "wholly insubstantial and frivolous," *Bell v. Hood*, 327 U.S. 678, 682-683 (1946), may the district court decline jurisdiction over a claim that arises under federal law. See also *Hagans v. Lavine*, 415 U.S. 528, 538 (1974). The court does not lack jurisdiction if it is merely skeptical of whether a claim is one upon which relief may be granted. Dismissal for failure to state a claim is action on the merits, as this Court long ago explained:

Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

Bell v. Hood, 327 U.S. at 682. The court of appeals correctly held that respondents' federal claims are neither obviously frivolous nor foreclosed by prior caselaw so as to justify dismissal for lack of subject-matter jurisdiction. *Hagans v. Lavine*, 415 U.S. 528 (1974). We briefly illustrate the correctness of that judgment by summarizing the theory of respondent's tribal-status and equal-protection claims.

The claim that respondents were unconstitutionally denied benefits provided to "Native village governments" by the Alaska Legislature as a result of the view of petitioner and the State Attorney General that Noatak and Circle are not tribal governments, but "racially exclusive organizations," raises significant equal-protection as well as federal common-law issues.⁷ "Paradoxical as it is," as Judge Noonan

⁷ Even without the equal-protection claim, the villages' claim that they are in fact "federally recognized Indian tribes" entitled to treatment as political entities under federal law presents a federal question. A federal question is presented if vindication of a right or benefit under state law turns upon the construction and application of federal law. See *Franchise*

wrote for the majority below, "the allegation that the move from a tribal basis to a non-tribal basis for the [revenue-sharing] bonus was racially discriminatory is an intelligible claim. Any governmental action based on the racial character of those affected is presumptively invalid." Pet. App. B21.

The Constitution expressly singles out Native tribes for special consideration and implicitly authorizes their discrete treatment by both the state and federal governments. See *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1859); see also *Oneida I*, 414 U.S. at 672 n.7; F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 658-59 (1982 ed.) [hereafter, "COHEN"]. While the parameters of state-tribal relations in the context of attempted *beneficial* treatment of tribes have seldom been litigated, every court that has considered the matter has upheld beneficial state action,⁸ and "[s]uch state laws have long been assumed valid." COHEN at 659.

The Court has frequently held that federally recognized Indian tribes have a unique political status and therefore may be accorded special beneficial treatment under the Constitution.

Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians . . . If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United

Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983); *Smith v. Kansas City Title and Trust Co.*, 255 U.S. 180 (1921). Moreover, questions of tribal rights and powers are inherently questions of federal law. See, e.g., *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985).

⁸ *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir.), cert. denied, 444 U.S. 870 (1979); *St. Paul Intertribal Housing Board v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983); *Peyote Way Church of God v. Smith*, 556 F. Supp. 632, 638-639 (N.D. Texas 1983); *State v. Forge*, 262 N.W.2d 341 (Minn. 1977).

States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the government toward the Indians would be jeopardized.

Morton v. Mancari, 417 U.S. 535, 552 (1974), quoted in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976); accord, *United States v. Antelope*, 430 U.S. 641 (1977).

The Alaska Legislature, acting in accordance with this long line of precedent, chose to provide benefits to Native tribes as independent, self-governing members of the body politic.⁹ Petitioner, however, has rejected the political status of Alaska Native tribes under federal law and instead classified them as racial groups which the State is barred from giving special consideration. Respondent's challenge to that state action is not a frivolous claim, nor is it one which has been foreclosed by prior holdings.¹⁰

That race was a primary factor which caused petitioner to conclude that State aid to tribes is prohibited is demonstrated by the Attorney General's opinions whose entire

⁹ Indeed, the Revenue Sharing Act recognizes the tribal status of all Native villages organized under the IRA or listed in ANCSA (precisely the same conclusion reached by the court below). The Alaska Legislature's action was typical of that taken by many states with Indian tribes within their borders. See COHEN, *supra*, at 658 n.47.

¹⁰ See, e.g., *Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson*, 571 P.2d 1373, 1375 (Wash. 1977) rev'd sub. nom., *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 692-95 (1979) (Washington's refusal to regulate its fisheries in such a way as to accommodate Indian treaty fishing rights could not "survive the command of the Supremacy Clause" *Id.* at 695); *Fisher v. District Court*, 424 U.S. 382 (1976) (in sustaining a lower court decision holding that tribal courts have exclusive jurisdiction over Indian adoptions the Court rejected the claim of the would-be adoptive parents that the Court had deprived them of equal protection under the Montana Constitution by denying the Montana courts jurisdiction over Indian adoptions). Since the Alaska Revenue Sharing Act implemented the overriding federal policy of encouraging tribal self-government, any conflicting provision of the Alaska Constitution, including its equal protection clause—if construed as precluding such treatment—must fall under the weight of the Supremacy Clause.

analysis is premised upon classifying Alaska tribes as "racially exclusive group[s]" or "racially exclusive organization[s]"—and rejecting their status as recognized tribal governments. J.A. 21, 25, 28, 30. Thus, petitioner acted contrary to this Court's determination in *United States v. Mazurie*, 419 U.S. 544 (1975), that Indian tribes are unique sovereigns, not mere private voluntary organizations.¹¹

This is a classic example of the racial discrimination under color of state law proscribed by the Fourteenth Amendment. Moreover, it also contravenes the Indian Commerce Clause (Art. I, § 8, cl. 3) and federal Indian common law which not only authorize separate treatment for Native tribes, but pre-empt state laws purporting to bar such treatment. Had petitioner correctly classified tribes as political bodies, which is not a suspect class, the Legislature's action would easily have satisfied the rational relation test and the tribes would have received their full shares. See *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463 (1978). Instead, petitioner classified respondent Tribes by the racial ancestry of their members, thus creating a racial classification where none existed, and based on that suspect classification denied the Tribes their full share of statutory benefits. What the Legislature gave the tribes by reason of their political status, the petitioner took away by reason of their race.

¹¹ Amici States attempt to equate Alaska's expansion of its revenue sharing program to "no more than a modification of an affirmative action program like that upheld in *Crawford v. Los Angeles Board of Education*, 458 U.S. 527 (1982)." Amici Brief of Alabama et. al., at 40-41. The States' premise is wrong. The Alaska revenue-sharing program was not a "race-related" "affirmative action program," but a "politically related" revenue-sharing program between the State and tribal governments. Thus, unlike *Crawford*, it was the Commissioner's revision of this program—not the original Act—which was based on race. The dissenting judge below, like Alabama, et al., thus erred in claiming that the State was merely treating Natives and non-Natives similarly. Pet. App. at B25. The claim is that the Legislature treated the Native villages differently based on their political status—not based on their members' race. Petitioner, on the other hand, diluted the benefits provided by the Legislature due to his view (adopted from the Attorney General) that the villages are mere racial groups.

The Tribes' federal claims are substantial and the district court was therefore obliged to exercise its jurisdiction on the merits.

II. RESPONDENTS ARE "DULY RECOGNIZED" INDIAN TRIBES FOR PURPOSES OF SUIT UNDER 28 U.S.C. § 1362

The substantial federal questions raised by respondents establish the subject-matter jurisdiction of the district court under the general federal-question jurisdictional statute, 28 U.S.C. § 1331,¹² and also satisfy the practically identical federal-question requirement of the Indian-tribe jurisdictional statute, 28 U.S.C. § 1362.¹³ Petitioner does not challenge respondent Noatak's right to sue pursuant to § 1331, but he does deny that either Noatak or Circle is a "duly recognized" tribe for § 1362 purposes. The issue is easily resolved.

Resolution of the issue of respondent Noatak's capacity to invoke § 1362 is made especially easy by petitioner's concession here, completely reversing his position below, that "[t]he State of Alaska believes that the Native Village of Noatak is a tribe." Pet. Br. 8; see also *id.* at 29 (the State "believes that the Native Village of Noatak would meet all the criteria in federal law for recognition as a tribe").¹⁴ For purposes of the narrow jurisdictional issue

¹² "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

¹³ "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

¹⁴ In his answer to respondents' complaint in the district court, petitioner denied that Noatak "is a government" (J.A. 36), and throughout the proceedings in both the trial court and the Ninth Circuit petitioner steadfastly disputed Noatak's status as a federally recognized Indian tribe. Petitioner's position began to shift in his petition for certiorari, however, when he stated that "the state believes that Noatak may qualify as a tribe under federal law for certain purposes." Pet. 12 (emphasis added). The shift is now complete, but petitioner has given no indication that

before the Court, therefore, it must be taken as established that Noatak is a tribe. The only remaining question, which petitioner apparently does not concede, is whether Noatak has been "duly recognized" by the Secretary within the contemplation of § 1362. It plainly has been, as has Circle Village.

A. The Secretary Officially Recognized Noatak Over Fifty Years Ago Pursuant To The Indian Reorganization Act

Pursuant to the Indian Reorganization Act (IRA) of 1934, as amended, 25 U.S.C. §§ 476 *et seq.*, the Secretary has recognized over 70 Alaska Native villages, including Noatak. That Act enabled tribes in Alaska and elsewhere, if they so chose, to reorganize their existing governments or to form new governments. *Id.*, § 479. As initially enacted in 1934, however, the Act defined "tribe" as "any Indian tribe, organized band, pueblo or the Indians residing on one reservation." *Id.*¹⁵ With few exceptions, Alaska Native villages were not located on reservations and were "not grouped easily into bands or tribes." COHEN, *supra*, at 751; H.R. REP. NO. 2244, 74th Cong., 2d. Sess. 1-2 (1936). Thus, most villages could not take advantage of the IRA.

To remedy this defect (without going through the intermediate step of setting up some 200 reservations), Congress amended the Act in 1936 to extend its benefits to Alaska's non-reservation Native communities. 25 U.S.C. § 473a. The

he has altered his view that respondent must still be dealt with as a racially-defined group. (Petitioner does continue to dispute Circle Village's tribal status, but as we demonstrate, Circle has also been "duly recognized" within the meaning of § 1362.)

¹⁵ Thus, under the 1934 Act, Indians on reservations could organize and become tribes under the IRA whether or not they were historical tribes. This conclusion was expressly confirmed by Felix Cohen: "where . . . the Indians of a given reservation organize and adopt a constitution under section 16 . . . they thereby become a tribe." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 270-71, n.22 (1942 ed.) (emphasis added). See also Solicitor's Opinion, April 15, 1936, 1 *Op. Sol. on Indian Affairs* 618 (U.S.D.I. n.d.); Solicitor's Opinion, January 29, 1941, 1 *Op. Sol. on Indian Affairs*, 1026, 1027 (U.S.D.I. n.d.).

amendment removed the requirement that "tribes" or "Indians" live on a reservation and instead authorized Alaska Natives "having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district" to organize under the Act. *Id.* § 473a.¹⁶ Thus, under the 1936 amendment Alaska Natives became eligible to organize under the IRA whether or not they had reservations.

On December 28, 1939, Noatak's constitution and by-laws were approved by the Secretary pursuant to § 16 of the IRA, 25 U.S.C. § 476. Pet. Br. at 4-5. According to Interior regulations, an IRA constitution is the "written organizational framework of any tribe reorganized pursuant to [the Act] for the exercise of governmental powers." 25 C.F.R. § 81.1(g) (emphasis added). It would seem self-evident that Secretarial approval of Noatak's constitution constitutes "due recognition" for purposes of suing under § 1362. But the State, while admitting that Secretarial approval of IRA constitutions for lower-48 tribes is sufficient recognition, denies that such approval has the same effect in Alaska. This anomalous result is defended with the argument that in the lower 48 states only "tribes" are eligible to organize under the 1934 Act, whereas under the Alaska Amendment non-tribal groups may also organize. Pet. Br. at 30-33. The State has simply misread the 1934 Act. Both it and the 1936 amendment authorize the organization of groups of Indians which were not historical tribes. See 25 U.S.C. § 479, and notes 18-20, *infra*.

¹⁶ Though somewhat inartful, this language sufficiently described the small village-based tribes in Alaska with which Congress was less familiar than the larger tribes on "lower 48" reservations. The 1936 amendment removed the technical "reservation" obstacle and allowed Alaska Native villages to "participate in the benefits of existing law to the same extent and manner as the Indians of the United States proper." H.R. REP. NO. 2244, 74th Cong., 2d. Sess. 3 (1936); S. REP. NO. 1748, 74th Cong., 2d. Sess. 3 (1936). The House Report (at 1-2) noted: "Many groups that would otherwise be termed 'tribes' live in villages which are the bases of their organizations." See also Smith & Kancewick, *The Tribal Status of Alaska Natives*, 61 COLORADO L. REV. 455, 496-98 (1990).

The State's insistence that the federal government cannot recognize a Native group that was not an historical tribe (Pet. Br. at 32, 33) is demonstrably wrong. Although the evidence overwhelmingly confirms that Alaska Native villages are historical tribes,¹⁷ historical tribal status has never been a prerequisite to federal recognition. Congress has repeatedly recognized non-historical Native groups as Indian tribes. It has on numerous occasions created, consolidated and confederated tribal governing bodies of several ethnological tribes, sometimes even speaking different languages.¹⁸ Even "where no formal Indian political organization existed, scattered communities were sometimes united into tribes." COHEN, *supra*, at 6.¹⁹ On the other hand, larger tribes have often been broken down into smaller units with each sub-group being recognized as a separate "tribe."²⁰ In short, so long as it is a "distinctly Indian communit[y]," *United States v. Sandoval*, 231 U.S. 28, 46 (1913), a tribe is what the political branches say it is.²¹

¹⁷ See FEDERAL FIELD COMMITTEE FOR DEVELOPMENT PLANNING IN ALASKA, ALASKA NATIVES AND THE LAND (G.P.O. 1968); and *Amici* Brief of the Native Village of Tanana, et al. [hereafter, "Tribes' Amici Br."]; and Smith & Kancewick, n.16, *supra*, at 482-496.

¹⁸ Indeed, the tribal entity in the leading case interpreting § 1362, *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 466 (1976), is not an historical tribe at all, but a consolidation of Flathead, Kootenay, and Upper Pend d'Oreilles Indians settled on the Flathead Reservation by the 1859 Treaty of Hell Gate. "These and many other consolidated or confederated groups have been treated politically as single tribes." COHEN, *supra*, at 6.

¹⁹ In *United States v. McGowan*, 302 U.S. 535 (1938), for example, this Court unanimously ruled that the non-historical Reno Indian Colony was a dependent Indian community and thus had tribal status. The colony was composed of several hundred non-reservation Indians scattered across Nevada, whom the government had settled on 28 acres near Reno.

²⁰ The Sioux and Chippewas are examples. See Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 (dividing great reservation of Sioux into seven separate reservations); Memo Sol. Int., Feb. 8, 1937 (Mole Lake Band of Chippewas), 1 Op. Sol. On Indian Affairs 724-25 (U.S.D.I. n.d.).

²¹ This Court concluded early on that when either the Congress or the Executive has recognized a tribe the judiciary must defer to its judgment:

As is plain from the face of the matter, the Secretary's approval of Noatak's IRA government establishes that it is a "duly recognized" tribe within the literal terms of § 1362.

B. Noatak and Circle Both Appear On The Secretary's Published Lists Of Recognized Tribes.

The Secretary has also duly recognized the respondents' tribal status (and that of 200 other Alaska Native villages) in Federal Register lists of recognized tribes. In 1978, the Department of the Interior issued regulations requiring the Secretary to annually publish an official "list" acknowledging the existence "of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs." 25 C.F.R. § 83.6(b). Such acknowledgment of tribal existence is a "prerequisite" to the "protection," "services, and ben-

In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and the other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1866). *Accord*, *Baker v. Carr*, 369 U.S. 186, 215-17 (1962). The courts have never deviated from this position. No congressional or executive determination of tribal status has ever been overturned by the judiciary. COHEN, *supra*, at 5. The only limitation on the authority of the political branches to recognize tribes is the rule against arbitrary action, that is, Congress may not take a group of non-Indians and arbitrarily call it a tribe. *United States v. Sandoval*, 231 U.S. at 46. See also, e.g., 25 C.F.R. § 83.7(e) (tribes may be recognized by regulation if members are descendants of combined historical tribes).

Petitioner also claims that organization under the Alaska IRA cannot constitute federal recognition because under the Act an Indian can be a member of more than one tribe, whereas Interior's regulations for recognizing new tribes prohibit dual membership. Pet. Br. at 32. The claim is without merit. The regulations simply require that "[t]he membership of the petitioning group [be] composed principally of persons who are not members of another . . . tribe." 25 C.F.R. § 83.7(b). There is no absolute prohibition of dual membership. Furthermore, in the absence of affirmative federal law to the contrary, tribal membership is solely a matter of tribal law. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

efits from the Federal Government available to Indian tribes." 25 C.F.R. § 83.2.

Such acknowledgement shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes

25 C.F.R. § 83.2. Inclusion on the list is recognition that the tribe has "a government to government relationship to the United States." 25 C.F.R. § 83.11.

Both Noatak and Circle are on all of the Secretary's lists of recognized tribes.²² The State argues that these lists are not intended to recognize the tribal status of Alaska Native villages, but merely to identify those entities eligible for funds and services under congressional Indian programs. But that is not what the regulation says. It requires the Secretary to publish a "list of all tribes which are recognized and receiving services." 25 C.F.R. § 83.6(b).²³ Use of the conjunctive "and" obviously entails recognition as well as receipt of services.

The State argues against the effect of the Secretary's lists, purporting to find significance in the titles,²⁴ former

²² See, e.g., 47 Fed. Reg. 53130, 53134 (Nov. 24, 1982); 48 Fed. Reg. 56862, 56865, 56866 (Dec. 23, 1983); 50 Fed. Reg. 6055 (Feb. 13, 1985); 51 Fed. Reg. 25115, 25118 (July 10, 1986); 53 Fed. Reg. 52829, 52834 (Dec. 29, 1988).

²³ Because the "acknowledgement of tribal existence by the Department is a prerequisite to . . . services and benefits from the federal government available to Indian tribes," 25 C.F.R. § 83.2 (emphasis added), an Indian group cannot receive "services and benefits" unless it has been "acknowledged" to be a tribe. Therefore, if a Native group receives such services and benefits it must have received such acknowledgment. See Smith & Kancewick, n.16, *supra*, 480-82.

²⁴ Organizationally, the Alaska villages are on a list entitled "Native Entities," separate from the list of the 300 lower 48 tribes which are titled "Tribal Entities." Lacking, however, is any text indicating the Secretary made two lists for purposes of legal differentiation rather than administrative convenience. The titles and section headings cannot limit the plain meaning of the text, *Railroad Trainmen v. Baltimore & Ohio*

preambles,²⁵ and the latest list's inclusion of Alaska Native corporations.²⁶ These arguments are unavailing for the reasons set forth in the margin.

Ry. Co., 331 U.S. 519, 528-29 (1947). The two lists were assembled at different points; the initial lower-48 list publication of February 6, 1979 contained a promise that the list of eligible Alaska entities would be published at a later date. See 44 Fed. Reg. 7235 (Feb. 6, 1979). The different titles merely reflect the fact that most Alaska tribes are called "villages" or "communities," whereas most tribes in the lower 48 are called "tribes." In fact, the text confirms the Secretary's intention that Alaska villages be accorded the same status as tribes elsewhere: the footnote to the lists defines "Indian Tribal Entities" to include "Indian Tribes, Bands, Villages, Communities and Pueblos as well as Eskimos and Aleuts." See e.g., 51 Fed. Reg. 25115. A tribe by any other name is still a tribe. See Respondent Circle's Brief.

²⁵ The State has argued that language in the preamble to the 1982 Alaska list is inconsistent with tribal recognition. See 47 Fed. Reg. 53133-34 (Nov. 24, 1982). The argument is that the preamble's reference to the eligibility of "additional entities in Alaska which are not historical tribes" refers to the 200 Native villages on the list. These words, however, clearly refer to Native corporations created under ANCSA, not the listed villages. The remainder of the preamble makes it clear that the concern was over the Native corporations which had been designated as "tribes" in the Indian Self-Determination Act, solely to render them eligible to contract for the provision of funding and services to Native village tribes and their members. *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471 (9th Cir. 1987). These corporations are the "non-historical tribes" referred to in the preamble and were deliberately excluded from the list in order to avoid the confusion that might arise from the publications of an "overlapping," multiple eligibility listing.

²⁶ More recently, Interior changed its approach and included the ANCSA corporations. The preamble to the 1988 list explains clearly that these corporations were added to reflect their statutory eligibility for funding and services under the Self-Determination Act, 53 Fed. Reg. at 52832, not as an acknowledgment of tribal status in the political sense. Notably, the preamble does not purport to rescind the Department's prior recognition of the villages included on the earlier lists and retained on the 1988 list. Since scope of any tribes' power can only be determined by reference to relevant treaties, statutes and common law, the preamble disclaims any intent to have the list construed to "determine . . . the extent of the powers and authority of . . . [the listed] entities"; but significantly, it does not disclaim an intent to acknowledge the tribal status of the listed villages.

As the court below held, if Congress has recognized a tribe, the Secretary is without discretion to withhold recognition. Pet. App. at B9. And it cannot seriously be doubted that ANCSA—which settled the aboriginal land claims of the Native villages in exchange for fee title to 44 million acres of land, nearly a billion dollars, and continued federal services and programs for which only “tribal Indians” are eligible—constitutes tribal recognition in the most fundamental sense imaginable. It is axiomatic that the only Native groups which may assert claims of aboriginal title are tribes. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). The Secretary has not only acted rationally in placing Noatak and Circle on his published lists; he was not free to do otherwise.²⁷

Alaska Native villagers, for the most part, continue to occupy their aboriginal homelands and, like the Inupiat Eskimos of Noatak and the Athabascan Indians of Circle Village, they yet today hunt and fish on their ancestral hunting and fishing grounds. They are the least-dislocated, least-disbanded, least-assimilated of all the tribes in the United States. In accordance with the entire, albeit comparatively short, history of dealings between Alaska tribal villages and the United States, the Secretary has given them due recognition.²⁸ Like all “other federally recognized tribes with a government-to-government relationship to the United States,” 25 C.F.R. § 83.11(a), they are authorized to bring federal-question suits in their own names in the federal district courts under 28 U.S.C. § 1362.

²⁷ See Briefs of Respondent Circle and Amici Tribes, which set forth numerous other congressional acts and executive actions which expressly recognize the tribal status of both Noatak and Circle.

²⁸ This history is capably set forth in detail in the Tribes’ Amici Brief.

III. THE DOCTRINE OF ELEVENTH AMENDMENT SOVEREIGN IMMUNITY DOES NOT BAR RESPONDENTS’ SUIT, IN WHOLE OR IN PART

A. Even If Otherwise Applicable, The Eleventh Amendment Does Not Foreclose Respondents’ Request For Prospective Relief

The only defendant in this case is petitioner, Alaska’s Commissioner of Community and Regional Affairs, who is sued in his official capacity only. Respondents’ complaint seeks both prospective declaratory and injunctive relief, and retroactive money damages. J.A. 15-19. The prospective relief sought in this case is permissible even if the Eleventh Amendment is applicable to federal-question suits against States by federally recognized Indian tribes. In determining whether the Amendment forecloses particular remedies in such cases, the Court “look[s] to the substance rather than to the form of the relief sought, . . . and will be guided by the policies underlying the decision in *Ex parte Young*.” *Papasan v. Allain*, 478 U.S. 265, 279 (1986). It continues to be settled law, under the rule of *Ex parte Young*, 209 U.S. 123 (1908), that the Amendment does not bar a suit against a state official in his official capacity for prospective declaratory and injunctive relief, “ ‘because official-capacity actions for prospective relief are not treated as actions against the State.’ ” *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2311 n.10 (1989), quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985).²⁹ The district court thus erred in dismissing respondents’ claims for prospective relief on Eleventh Amendment grounds.

The district court held (Pet. App. A7), and petitioner argues (Pet. Br. 10 & n.11) that the case involves only “money damages but no prospective relief,” because the

²⁹ Accord, e.g., *Papasan v. Allain*, 478 U.S. 265, 276-279, 281-282 (1986); *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102-03 (1984); *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Hutto v. Finney*, 437 U.S. 678, 690-93 (1978); *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977); *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974).

Legislature amended the program in 1985 to include communities without tribal governments. But this argument ignores the fact that the statute was amended as a result of, and to conform with, the persistent view of the Attorney General (adopted by the Commissioner) that the previous program was unconstitutional, because respondent tribes must be dealt with as "racially exclusive organizations" rather than as federally recognized Indian tribes. See pp. 1,2,9,10, *supra*.³⁰ The Legislature's adoption of the course of action followed by petitioner and the Attorney General thus incorporates, rather than eliminates, the very alleged unconstitutional policy that is the principal focus of respondents' complaint.

Respondents thus claim a continuing violation of federal law (a State policy abridging their federally protected status as tribes and treating them on racial rather than political grounds), for which prospective injunctive or declaratory relief can readily be fashioned.³¹ Respondents' claim for such prospective relief, in order to be freed of the State executive policy of treating them as "racially exclusive groups" and to enable them to appeal to and deal with the Alaska Legislature as politically distinct Native tribes under federal law, is therefore entitled to an adjudication on the merits regardless of the availability of the damages remedy which they also seek. Such relief would merely "serve[] directly to bring an end to a present violation of federal law." *Papasan v. Allain*, 478 U.S. at 278.

³⁰ As previously noted (p. 11, *supra*), the State now concedes that respondent Noatak is an Indian tribe. But the State has given no indication that it has abandoned its contention that the Legislature must continue to deal with tribes as "racially exclusive organizations."

³¹ Such relief could include a declaratory judgment affirming respondents' status as federally recognized tribes, and an injunction prohibiting petitioner from treating respondents on racial grounds in the future. Alaska is of course free to eliminate revenue-sharing altogether, or to decline to provide special funding to Native village governments for any number of legitimate reasons, or for no reason at all, but not for an unconstitutional reason such as racial discrimination or denial of the federally guaranteed status of tribes.

Of course, if the Eleventh Amendment applies to suits by Indian tribes, respondent acknowledges that in the absence of an act of Congress its request for retroactive monetary relief for losses resulting from the expansion of the revenue-sharing program prior to this suit would be prohibited.³² We show below, however, that the Eleventh Amendment does not bar respondent's prayer for damages.

B. The Amendment Does Not Apply To Suits By Indian Tribes

"[T]he significance of the Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution," *Welch v. Texas Dept. of Highways & Public Transport.*, 483 U.S. 468, 472 (1987) (plurality opinion), and *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985) (both quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 96 (1984)), and the Court "has drawn upon principles of sovereign immunity to construe the Amendment . . ." *Port Authority Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868, 1872 (1990). "The contours of state sovereign immunity are determined by the structure and requirements of the federal system." *Welch*, 483 U.S. at 487. See also *Dellmuth v. Muth*, 109 S. Ct. 2397, 2400 (1989). Before analyzing the case at bar in light of those principles and considerations, however, it is necessary to address the half-hearted argument of the State and amici³³ that the Court has already settled the question.

1. The question is an open one

The argument that the question is foreclosed by precedent is based upon *United States v. Minnesota*, 270 U.S.

³² Except that prospective relief may yet be granted with respect to payment of the \$611 which petitioner is holding for the benefit of respondent Noatak in the event Noatak prevails on the merits. See Pet. Br. 4 and n.6; n.3, *supra*. This money petitioner voluntarily withheld from the legislative appropriations for the revenue program, when he made his fiscal year 1986 disbursements to the villages.

³³ Pet. Br. 17; Alabama Br. 11-12; State Governments Br. 21 n.12.

181 (1926), and *Arizona v. California*, 460 U.S. 605 (1983). In *Minnesota*, an action brought by the United States on behalf of Indians to recover lands (or their value) from the State, the jurisdictional question presented was whether the United States properly could invoke the Court's original jurisdiction on behalf of the Indians. In the course of rejecting the State's argument that the United States was only a "nominal party" and "that the suit is essentially one brought by the Indians against the State" (270 U.S. at 193), the Court assumed the correctness of the State's contention that State sovereign immunity would have barred the action if it had been brought by the Indians. *Id.* at 194-95.³⁴

The Court's discussion in *Minnesota* reflected only an *arguendo* assumption. Cf. *Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273, 2301 (1989) (Scalia, J., concurring in part

³⁴ The Court said (270 U.S. at 194-95):

Counsel for the state point out that the Indians could neither sue the state to enforce the right asserted in their behalf, nor sue the United States for a failure to call on the state to surrender the lands or their value, and from this they argue that the United States is under no duty and has no right to bring this suit. But the premise does not make for the conclusion. The reason the Indians could not bring the suits suggested lies in the general immunity of the state and of the United States from suit in the absence of consent. Of course, the immunity of the state is subject to the constitutional qualification that she may be sued in this court by the United States, a sister state, or a foreign state. *United States v. Texas* Otherwise, her immunity is like that of the United States. But immunity from suit does not reflect an absence of duty.

The Court's acceptance of the State's contention that "the Indians" could not sue the State is no more essential to the actual decision of the case than is the Court's assumption that the State could be sued by a foreign state—a proposition which the Court expressly rejected when it was directly presented eight years later in *Monaco v. Mississippi* (see note 46, *infra*). But even if the Court's statements in *Minnesota* are read to reflect an actual belief that the State's arguments were correct, and even if it is inferred that the references to "the Indians" encompassed tribes as well as individuals, this part of the decision plainly is "not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. at 671.

and dissenting in part). That is precisely how the Court treated it in *Arizona v. California*, 460 U.S. at 614, where the Court, citing *Minnesota*, held that, "[a]ssuming, *arguendo*, that a State may interpose its immunity to bar a suit brought against it by an Indian tribe," the Eleventh Amendment did not prevent the tribes there from intervening in an action brought against the states by the United States. The question was plainly regarded as open and it has remained open since.³⁵

2. The relevant principles of state sovereign immunity and federalism

Whatever may be deduced about the "fundamental principle of sovereign immunity" as it was understood by the Framers, and as it has been understood and applied by the Court, a central and recurring theme is that its applicability is generally limited to suits by *individuals*—by "private citizens" and "private parties"—against sovereigns without consent. This is apparent from the views of Hamilton, Madison and Marshall upon which the Court has repeatedly relied and which the Court has often quoted—Hamilton, in THE FEDERALIST No. 81: "It is inherent in the nature of sovereignty not be amenable to the suit of an individual without its consent" (emphasis in original; underlining added), and "[t]he contracts between a nation and *individuals* are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force" (emphasis added); Madison, in the Virginia Convention: "It is not in

³⁵ See, e.g., *Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (rejecting the clear assumption, if not actual holding, of Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), that a foreign state could sue a state); *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904) (rejecting the broad reliance of Justice Bradley's opinion in *Hans v. Louisiana*, 134 U.S. 1 (1890), upon the dissenting opinion in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)); *Hans v. Louisiana*, *supra*, 134 U.S. at 19-20 (rejecting Chief Justice Marshall's strong suggestion in *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264 (1821), that federal-question suits by individuals against states were not barred; see also *Welch*, 483 U.S. at 482 n.11 (plurality opinion) (Chief Justice Marshall's statements in *Cohens* "were unnecessary to the decision").

the power of *individuals* to call any state into court" (emphasis added); Marshall, in the Virginia Convention: "an *individual* cannot proceed to obtain judgment against a state, though he may be sued by a state" (emphasis added).³⁶ That the principle was aimed at actions by individuals against sovereigns was also the consistent view of the anti-Federalists.³⁷ And this object—to preclude suits by *individuals* against state—is echoed in the major decisions of this Court.³⁸ It recurs throughout the leading decision in *Hans*

³⁶ Quoted in, e.g., *Welch*, 483 U.S. at 480 n.10 (plurality opinion); *Edelman v. Jordan*, 415 U.S. at 660-61 n.9; *Monaco v. Mississippi*, 393 U.S. at 324-25 & 325 n.4; *Hans v. Louisiana*, 134 U.S. at 12-14; see also *Nevada v. Hall*, 440 U.S. 410, 419-20 (1979); *id.* at 436 (Rehnquist, J., dissenting); *Atascadero*, 473 U.S. at 265-77 (Brennan, J., dissenting).

³⁷ For example, Patrick Henry objected to the prospect of money judgments being rendered against a state, "if, in a suit between a state and *individuals*, the state were cast"; the "Federal Farmer" complained that the state-citizen diversity clause of Article III would "so humble a state, as to bring it to an *individual* in a court of law"; and "Brutus" asserted that it was "improper" to "subject[] a state to answer in a court of law, to the suit of an *individual*," because "[t]his is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to" (emphases added), quoted in *Atascadero*, 473 U.S. at 266-73 (Brennan, J., dissenting). Also, the New York Convention, while ratifying the Constitution, declared its understanding that the federal judicial power would not "authorize any Suit by any *Person* against a State" (emphasis added), quoted in *Welch*, 483 U.S. at 483 (plurality opinion).

³⁸ E.g., *Pennsylvania v. Union Gas Co.*, 109 S. Ct. at 2297-98 (Scalia, J., concurring in part and dissenting in part) (emphasizing the constitutional protection of sovereigns from "*private suit*" and arguing that "[t]he inherent necessity of a tribunal for peaceful resolution of disputes between the Union and the individual States, and between the individual States themselves, is incomparably greater . . . than the need for a tribunal to resolve disputes on federal questions between *individuals* and the States" (emphases added)); *Quern v. Jordan*, 440 U.S. 332, 337 (1979) (Amendment bars "a suit in federal court by *private parties*" (emphasis added)); *Alabama v. Pugh*, 438 U.S. 781 (1978) (*per curiam*) ("suits by *private parties* against States and their agencies" are prohibited (emphasis added)); *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184, 196 (1964) ("sovereign immunity" is "the principle that a State may not be sued by an *individual* without its consent" (emphasis added)); *id.* at 187, 192; *Ex parte New York, No. 1*, 256 U.S.

v. Louisiana, and is an integral part of the Court's constitutional holding in that case.³⁹

The private-suit distinction was underscored just two years after the decision in *Hans* when the Court held, in *United States v. Texas*, 143 U.S. 621 (1892), that the Amendment does not bar a suit by the United States against a state. Justice Harlan's opinion for the Court⁴⁰ cites *Hans* for the understanding that "the judicial power of the United States does not extend to suits of *individuals* against states," 143 U.S. at 644 (emphasis in original), and describes *Hans* as having "proceeded upon the broad ground that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an *individual* without its consent.'" *Id.* at 645-46 (emphasis in original). The Court concluded that "the suability of one government by another government . . . does no violence to the inherent nature of sovereignty." *Id.*

490, 497 (1921) ("the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by *private parties* against a State without consent given" (emphasis added), quoted in *Welch*, 483 U.S. at 489 (plurality opinion), and *Pennhurst*, 465 U.S. at 120); *Ex parte New York, supra*, 256 U.S. at 500 ("the immunity of a state from suit in personam in the admiralty, brought by a *private person*, is clear" (emphasis added)); *id.* at 502 (the case in effect involves "suits brought by *individuals* against the state of New York" (emphasis added)); *id.* at 503 ("the states . . . enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of *individuals*" (emphasis added)). See also *State Governments Br.* at 7-8.

³⁹ E.g., 134 U.S. at 11 (the Eleventh Amendment "did not in terms prohibit suits by *individuals* against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits"); *id.* at 12 (the Amendment was addressed to "this question of the suability of the States by *individuals*"); *id.* (federal judicial power "to entertain suits by *individuals* against the States had been expressly disclaimed, and even resented" by the proponents of the Constitution); *id.* at 15 ("The letter is appealed to now, as it was then, as a ground for sustaining a suit by an *individual* against a State"); *id.* at 21 ("the rule . . . exempts a sovereign State from prosecution in a court of justice at the suit of *individuals*") (emphasis added).

⁴⁰ Justice Harlan had specially concurred in the *Hans* "holding that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued." 134 U.S. at 21 (concurring opinion).

at 646.⁴¹ Similarly, when the Court held twelve years later that the Amendment does not bar suits between sister states, it said: "it will be perceived that this amendment only granted to a state immunity from suit by an individual, and did not affect the jurisdiction over controversies between two or more states." *South Dakota v. North Carolina*, 192 U.S. 286, 315 (1904).

⁴¹ In complete context, after referring to the Framers' necessary understanding of the possibility "that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine [controversies between the United States and some of the States] according to the recognized principles of law" (143 U.S. at 644-45), the Court reasoned (*id.* at 646):

The question as to the suability of one government by another government rests upon wholly different grounds [than a suit by an individual]. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the states. The submission to judicial solution of controversies arising between these two governments, 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other' (*M'Culloch v. Maryland* . . .), but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. . . . The exercise, therefore, by this court, of such original jurisdiction [in State/State and United States/State boundary disputes] . . . so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other states.

Eight years later the Court, in *Smith v. Reeves*, 178 U.S. 436 (1900) (also authored by Justice Harlan), made it clear that a federal corporation chartered by Congress (there, the receivers of the Atlantic & Pacific Railroad Company) falls on the "individual" side of the line: "It could never have been intended to exclude from Federal judicial power [federal-question] suits . . . when brought against a state by private individuals or state corporations, and at the same time extend such power to suits of a like character brought by Federal corporations against a state without its consent." *Id.* at 449. (Federal corporations generally have been treated like private corporations in sovereign-immunity analysis, unless Congress has affirmatively provided otherwise. See, e.g., *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512 (1984), and cases there cited and discussed.)

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934), provides the sole exception to the rule that the Eleventh Amendment bars only suits by individuals. In that case, the Court held that the Amendment barred a foreign country from suing a state. Chief Justice Hughes' opinion recognized that the holding did not result from the language of the Amendment, but, he wrote, "Behind the words of the constitutional provisions are postulates which limit and control." 292 U.S. at 322. An examination of what was at issue in *Monaco* shows that the factors that produced the result (the "postulates which limit and control") do not apply to suits by Indian tribes.

Monaco was brought in 1933 to enforce bonds issued by the State of Mississippi in 1833 and 1838. The bonds fell due in the years immediately preceding and following the Civil War, and had never been paid off. They had been kept in the bondholders' families for the century or near-century since their issue, and the more than half-century since their default. The families finally donated them to the Principality of Monaco in the hope that the Principality might be able to circumvent the Eleventh Amendment bar applicable to individuals. To the Court, this was a familiar kind of case.

The expansive reading of the Eleventh Amendment to apply beyond its terms originated in a series of suits brought to enforce bonds, such as these, on which the Southern states defaulted after the Civil War.⁴² The Court in these cases resolutely set its face against suits on these bonds, and relied on the Eleventh Amendment to bar them. Prior to these cases, it was unclear whether the Amendment barred suits brought by out-of-state citizens, or whether it merely failed to authorize party-based jurisdiction in suits

⁴² See, e.g., *Louisiana v. Jumel*, 107 U.S. 711 (1882); *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446 (1883); *The Virginia Coupon Cases*, 114 U.S. 269 (1885); *In re Ayers*, 123 U.S. 443 (1887). J. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987).

brought by out-of-state citizens.⁴³ In *Louisiana v. Jumel*, 107 U.S. 711 (1882), the Court held that the Amendment was a bar to bondholder suits by out-of-state citizens. In *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), a year later, the Court held that a state could not bring suit on behalf of individual bondholders.⁴⁴ Finally, in *Hans v. Louisiana*, the Court held in 1890 that bondholder suits brought by in-state citizens were also barred, although by the principle behind the Amendment rather than its text. *Monaco* was the last in this series of cases, decided more than 40 years after *Hans*.

In *Monaco* the Court held that the assignment of state-issued bonds to a foreign country could not create a right superior to that of the original bondholders: "We conclude that the Principality of Monaco . . . is in no better case than the donors of the bonds. . . ." 292 U.S. at 332. In part, the case stands for the simple proposition that the bar of the Amendment cannot be evaded by legal trick or subterfuge.⁴⁵ The Court will look behind the form of the suit to the substance of what is sought to be achieved.

⁴³ See, e.g., Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1078-1091 (1983); Gibbons *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1941-2003 (1983).

⁴⁴ The Court eventually held that a state could bring a suit on its own behalf for recovery on defaulted bonds. *South Dakota v. North Carolina*, *supra*. The ability of states to bring suit as assignees of the state-issued bonds was based on the explicit grant of jurisdiction in Article III (§2, cl.7) over suits between states. Further, the desire for mutual accommodation and cooperation among the states greatly reduces the threat posed by the possibility of such suits, and differentiates them sharply from suits brought by foreign countries with no such constraints derived from domestic political considerations and sympathies.

⁴⁵ In a similar situation, the Court in *South Dakota v. North Carolina*, *supra*, had allowed this artifice for circumventing the *Hans* ruling for state bonds "given" to a state, despite a strong four-Justice dissent contending that the original bondholders were the real parties in interest and hence barred from suit by the *Hans* ruling. See 192 U.S. at 322-54 (White, J., dissenting). Even the *South Dakota* dissenters, however, agreed

But Chief Justice Hughes' opinion also relies on a deeper rationale applicable to all suits brought by foreign countries against states.⁴⁶ A foreign country "lies outside the structure of the Union," and cannot partake of any waiver of state sovereign immunity that "inheres in the acceptance of the constitutional plan." 292 U.S. at 330. Neither the states nor the United States are barred by the Amendment because they are sovereigns within the structure created by the document. But a foreign country is an external, rather than an internal, sovereign. If foreign countries could sue states directly, such suits would not be "limited to cases of alleged debts or of obligations issued by a State and claimed to have been acquired by transfer," and could "involve international questions in relation to which the United States has a sovereign prerogative." *Id.* at 330-331.⁴⁷ The Court therefore read the Eleventh Amendment to bar suits by a foreign country against a state, thereby forcing that foreign country to present its claim through the mediating body of the national government:

that "the purpose of the amendment was to prohibit the enforcement of individual claims against the several states by means of the judicial power of the United States." *Id.* at 329 (emphasis added); accord, *id.* at 330-31, 337.

⁴⁶ As to suits by foreign states against states, the Court expressly rejected the assumption of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and implicitly the dictum in *United States v. Minnesota* (see note 34, *supra*), that the judicial power encompassed coercive suits by a foreign state against a state:

Cherokee Nation rested upon the determination that the Cherokee Nation was not a "foreign State" in the sense in which the term is used in the Constitution. The question now before us necessarily remained an open one.

292 U.S. at 330.

⁴⁷ In *Welch*, the plurality, stating that "[t]he contours of state sovereign immunity are determined by the structure and requirements of the federal system," said that "[t]he rationale has been set out most completely" in Chief Justice Hughes' unanimous *Monaco* opinion. 483 U.S. at 487. The *Welch* opinion then lists the principal rationales of *Monaco*; as to the reason for barring suits by foreign states against states, *Welch* quotes only the interference-with-the-"sovereign prerogative"-of-the-United States rationale. *Id.*

It cannot be supposed that it was the intention [of the Constitution] that a controversy growing out of the action of a State, which involves a matter of national concern and which is said to affect injuriously the interests of a foreign State . . . should be taken out of the sphere of international negotiations and adjustment through resort by the foreign State to a suit [directly against a state].

Id. at 331.

As will be elaborated in the next section, the considerations that led the Court to bar foreign countries under the Eleventh Amendment are totally inapplicable to Indian tribes.

3. An Indian tribe is not comparable to an individual nor to a foreign state, and a suit by a tribe against a state is not inconsistent with the structure and requirements of the federal system

Even were it correct (*but see* note 51, *infra*), as the State and its *amici* argue,⁴⁸ "that the framers of our Constitution had not the Indian tribes in view when they opened the courts of the Union to [specified controversies]," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831),⁴⁹ that argument avoids, rather than answers, the question of the relationship of Indian tribes to principles of sovereign immunity and federal structure that the Framers *did* have in mind. The Convention and the constitutional structure it

⁴⁸ Pet. Br. 11-15; Alabama Br. 10-11.

⁴⁹ At the same time, however, the point refutes the contention of the *amici* States about Congress' rejection of a proposed addition to the Eleventh Amendment that would have exempted from the Amendment's bar actions arising under treaties. Alabama Br. 13-14. Contrary to the suggestion that this proposal was aimed at actions arising under Indian treaties, its intent "almost certainly [was] in order to permit enforcement of state debts to foreign citizens." Fletcher, *supra* n.43, at 1059 n.120. Of particular concern were certain provisions of the Treaty of Paris of 1783 that might subject the states to liability to British creditors. See *Atascadero*, 473 U.S. at 264 n.15 (Brennan, J., dissenting). See also *Welch*, 483 U.S. at 485 n.18 (plurality opinion).

created undoubtedly acknowledged the retained sovereign status of the Indian tribes,⁵⁰ just as surely as it recognized the retained sovereignty of the states—although the sovereignty of both was diminished by and made subordinate to the national government. Whatever the Framers might have thought about the capacity of the tribes to resort to the judicial power,⁵¹ as will be seen, tribal suits against

⁵⁰ In the Commerce Clause (Art. I, § 8, cl. 3), the Constitution recognizes, and confers upon Congress the power "[t]o regulate commerce" with respect to, three classes of sovereigns: "with foreign nations, among the several States, and with the Indian tribes." The separate status of the tribes is further expressed in the exclusion of "Indians not taxed" from the census upon which "Representatives and direct taxes shall be apportioned." Art. I, § 2, cl. 3. See also § 2 of the Fourteenth Amendment.

⁵¹ Contrary to the assumption that the tribes' only course of redress was by "appeal . . . to the tomahawk, or to the government," *Cherokee Nation*, 30 U.S. (5 Pet.) at 18, when President Washington met in 1790 with Cornplanter, Chief of the Seneca Nation, the President assured the Chief that Seneca lands were securely protected from any state or person by the Non-Intercourse Act of 1790: "If . . . you have any just cause of complaint against [a purchaser of your lands] and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." Quoted in *Oneida II*, 470 U.S. at 237 n.8; *id.* at 255 (Stevens, J., dissenting) (emphasis added). The problem with this promise, and the one that confronted the Cherokees in 1831 when they sought peaceful judicial redress against Georgia's assertion of all her sovereign power to appropriate their lands and annihilate them, was that the federal courts were "open" only if the government initiated the action. Congress did not confer general federal-question jurisdiction on the lower federal courts until the Judiciary Act of 1875 (now 28 U.S.C. § 1331), by which statute "Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789," *Zwickler v. Koota*, 389 U.S. 241, 247 (1967), quoting F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM*, 65 (1927); and, until even later than that, individual tribal Indians were not citizens of the United States and consequently were deemed incapable of suing in the federal courts. See, e.g., *Felix v. Patrick*, 145 U.S. 317, 330-32 (1892). The capacity of the tribes to bring federal-question suits, however, seems never to have been doubted, needing only a grant of jurisdiction. See, e.g., *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*

states do not come within the principles of sovereign immunity and federalism, as they conceived them, any more than do suits against states by the United States and sister states.

Manifestly, the proponents of retained state sovereign immunity and the adopters of the Eleventh Amendment "had not the Indian tribes in view." As is well-known to this Court, the Amendment was adopted in reaction to the Court's holding in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that a South Carolina citizen could bring an ordinary contract claim against the State of Georgia, relying only on the party-based grant of jurisdiction over suits between a state and an out-of-state citizen. *Edelman v. Jordan*, 415 U.S. at 662. The Amendment was passed quickly thereafter, in direct repudiation of that holding. *Id.*

During the last decade, there has been an enormous outpouring of academic literature on the history surrounding the adoption of the Amendment.⁵² There has been some

284 (1942, Univ. of New Mexico reprint).

The only general federal-question jurisdiction extant in the federal courts prior to 1875 was this Court's appellate jurisdiction over state court judgments under section 25 of the Judiciary Act of 1789. That jurisdiction was exercised the very next term following *Cherokee Nation*, without mention of the Eleventh Amendment, to nullify the same Georgia laws which the Tribe had attempted to directly challenge by invoking the Court's original jurisdiction. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). (Despite its limitations on the Article III judicial power, the Amendment is no barrier to the exercise of this Court's federal-question appellate jurisdiction over cases against states arising in the state courts. *McKesson v. Florida Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990).)

⁵² See, e.g., Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978); Fletcher, *supra* n.43; Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Amar, *Of Sovereignty Federalism*, 96 YALE L. J. 1425 (1987); Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1 (1988); L. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); W. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV.

difference of opinion among those who have addressed the Amendment's original meaning,⁵³ but there has never been so much as a hint in any of this literature that the ability of the Indian tribes to sue the states was contemplated by the adopters. They were concerned with the ability of private individuals, both foreign and domestic, to sue the states on domestic debts, and the ability of British subjects to recover obligations of the states under the Treaty of Paris between the United States and Great Britain.⁵⁴ There is not a shred of evidence that the ability of the Indian tribes to sue the states was even remotely in view.⁵⁵

1372 (1989); Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989); Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); Massey, W. Marshall, L. Marshall, and Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 117 (1990).

⁵³ See L. Marshall, *supra*; W. Marshall, *supra*; Massey, *supra*; Fletcher, *The Diversity Explanation*, *supra*.

⁵⁴ See, e.g., Gibbons, *supra* n.52, at 1895-1940; L. Marshall, *supra* n.52, at 1356-1371.

⁵⁵ It is beyond the necessary scope of our argument, but we agree with the historical conclusion reached by Justices Brennan, Blackmun, Marshall and Stevens in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J. dissenting), that the "diversity explanation" of the Eleventh Amendment is the best understanding of the original intent of the adopters of the Amendment. Professors Amar, Field, Fletcher, Gibbons, and Jackson, whose articles are cited above, have written extensively in support of this view based on their own research. For additional comments on the diversity explanation, see Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment after Pennhurst v. Halderman*, 12 HAST. CONST. L. O. 643, 652 (1985) ("persuasively developed" view); Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1599 n.103 (1990) ("persuasive" explanation); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 68 ("fully persuasive"); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 175 n.8 (2d ed. 1988) ("a powerful argument"). See also Easley, *The Supreme Court and the Eleventh Amendment: Mourning the Lost Opportunity to Synthesize Conflicting Precedents*, 64 DENV. U. L. REV. 485, 488 (1988) ("conclusion makes sense"); Harris & Kenny, *Eleventh Amendment Jurisprudence after Atascadero*, 37 EMORY L. J. 645, 654 (1988) ("persuasive" and "cogent"); Werhan, *Pullman Abstention after Pennhurst: A Comment on Judicial Federalism*, 27 WM.

It is not contended that an Indian tribe is a citizen of the State within which it is found, nor that it is a governmental unit of such a state.⁵⁶ And *Cherokee Nation* itself held that a tribe is not a foreign state within the meaning of the Constitution. But although not foreign, the tribes were deemed to be "states" in the sense of being self-governing bodies politic.⁵⁷ They were (and are) "domestic dependent nations," legally distinct from both the states and the United States, 30 U.S. (5 Pet.) at 17,⁵⁸ constituting

& MARY L. REV. 449, 460 n.46 (1986) ("a more sophisticated reading of the Eleventh Amendment").

⁵⁶ Just as "[a] state is not a citizen," *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894) (see also *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973)), so also a tribe is not a citizen of any state, nor a citizen or subject of any foreign state. See, e.g., C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE: JURISDICTION* 2d § 3622 (1984) (a tribe is not a citizen of a state for purposes of federal citizen or alien diversity jurisdiction); F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 372 (1942, Univ. of New Mexico reprint). And a tribe is not a part of either the state or federal government systems. See, e.g., *United States v. Barquin*, 799 F.2d 619 (10th Cir. 1986) (Indian tribe not a "local government agency").

⁵⁷ Chief Justice Marshall held: "So much of the argument [of the Tribe] as was intended to prove the character of the Cherokees as a State, as a distinct political society separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a State from the settlement of our country. . . . The acts of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts." 30 U.S. (5 Pet.) at 16. But, though "[t]he party defendant [the State of Georgia] may . . . unquestionably be sued in this court" (*id.* at 15-16), the Court concluded that the tribe was not a foreign state within Article III's grant of original jurisdiction, and hence not entitled to invoke the judicial power against a state, as it was then assumed a foreign state would be empowered to do.

⁵⁸ See also, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (tribes viewed "as distinct, independent political communities, retaining their original natural rights"; "a people distinct from others"); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973), quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886) ("not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union

"this third source of sovereignty in the United States."⁵⁹ While the Framers may have contemplated that the Indian

or of the State within whose limits they resided"); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("unique aggregations possessing attributes of sovereignty over both their members and their territory"; "a good deal more than 'private, voluntary organizations'"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("[a]s separate sovereigns pre-existing the Constitution"); *Duro v. Reina*, 110 S. Ct. 2053, 2060 (1990) ("limited sovereigns, necessarily subject to the overriding authority of the United States, yet retaining necessary powers of internal self-governance"). The nature of their legal status is well illustrated by *United States v. Wheeler*, 435 U.S. 313 (1978), in which the Court held that the Double Jeopardy Clause does not bar a federal felony prosecution of a person who has been previously convicted in a tribal court of a lesser included offense arising out of the same incident. The Court rested its decision on the doctrine that prosecutions by separate sovereigns for the same act do not constitute double jeopardy. Under this "dual sovereignty" doctrine, an offense against a tribe is deemed to be an offense against a sovereign separate and distinct from the United States.

Petitioner and amici place emphasis on the analogy of the relationship between the tribes and the United States to "that of a ward to his guardian." *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. But that analogy merely references the so-called "plenary power" of the federal government over the tribes, and its primary operation is to impose a trust responsibility upon the government; it does not undermine the retained sovereign status of the tribes which the government has not only refrained from extinguishing, but explicitly perpetuates by affirmative national policy.

⁵⁹ C. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 103-04 (1987). It is often recognized that in some respects tribes "have a status higher than states," *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959), or that they "occupy a sovereign status somewhat comparable to that of the States." *Oneida Indian Nation v. New York*, 520 F. Supp. 1278, 1306 (N.D.N.Y. 1981), *aff'd in part, vacated on other grounds*, 691 F.2d 1070 (2d Cir. 1982). Indeed, in a number of important respects Indian tribes enjoy immunities from state authority that are greater than the immunities of the United States and its officers from comparable forms of state action. See C. WILKINSON, *supra*, at 98 & nn. 65-69 (1987). Tribes "exercise local sovereignty in much the same way that states do outside of Indian country," *id.* at 116, as demonstrated by the Court's recent decisions in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), emphasizing the separate, independent status of tribal laws and courts.

tribes would eventually disappear or become assimilated,⁶⁰ the structure they adopted did not call for that end, and it is now accepted that the Indian tribes "are entitled to take their place as independent qualified members of the modern body politic."⁶¹

Thus, unlike private suits, a suit by an Indian tribe against a state falls squarely within the concept of "the suability of one government by another government." Consequently, to adopt the reasoning of *United States v. Texas*, 143 U.S. at 646, the exercise of judicial power over "controversies arising between these two governments [tribes and states], 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other' . . . , but both subject to the supreme law of the land [or the supreme power of Congress, in the case of the tribes], does no violence to the inherent nature of sovereignty." This tripartite scheme of divided sovereignty, in which the tribes continue to play a vital role as independent governments "dependent on, and subordinate to, only the Federal Government, not the States,"⁶² plainly was contemplated by the Framers—indeed, it was created by them.⁶³ A suit by a tribe against a state, therefore, does

⁶⁰ See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 593-94 (McLean, J., concurring).

⁶¹ *Arizona v. California*, 460 U.S. 605, 615 (1983), quoting *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968), quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).

⁶² *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

⁶³ The State's suggestion that the Indian Commerce Clause of the Constitution was of no moment, because it involved no real diminution of state sovereignty beyond that which had already been given up in the Articles of Confederation (Pet. Br. 15-16 & n.20), cannot be credited. Paragraph 4 of article 9 of the Articles (quoted by the State) had conditioned congressional power over Indian trade and affairs with the significant proviso "that the legislative right of any State within its own limits be not infringed or violated" (emphasis added). Legislative power, of course, is the essence of sovereignty, and the quoted proviso appears to have retained that sovereign right over Indian relations in the states.

not fall within the essential understanding of the principles of sovereign immunity as forbidding suits by individuals.

Further, the factors that led this Court in *Monaco* to find an Eleventh Amendment bar against suits by foreign countries do not apply to suits by Indian tribes. Suits brought by an Indian tribe are not likely to replicate the sort of suit in *Monaco*, in which the Principality was no more than a mere assignee of a private right. They will instead be suits, such as the one now before the Court, in which the tribe asserts an injury that affects it in its sovereign or governmental capacity. More basically, Indian tribes are sovereignties internal, rather than external, to the United States. Suits by Indian tribes do not implicate foreign relations and sensitive questions of foreign policy and negotiations.

Finally, and perhaps most important, Indian tribes have a special trust relationship to the national government, and the claims of the Indian tribal sovereigns are subject to mediation through that government. The United States government has the power, entirely independent of the Eleventh Amendment, to limit or even eliminate the power of Indian tribes to sue the states directly. Congress has not exercised that limiting power, however; it has done quite the opposite, authorizing Indian tribes to bring suits against the states. See, *infra*. But the existence of that power is a compelling reason to see Indian tribal sovereigns as fundamentally unlike foreign sovereigns. Indian tribes are do-

In fact, this and other "ambiguous phrases" in the Articles of Confederation "were so construed by the States of North Carolina and Georgia as to annul the [grant of congressional Indian-affairs] power itself." *Worcester*, 31 U.S. (6 Pet.) at 559. Thus, upon adoption of the Constitution, the states surrendered their retained legislative (and all other) sovereignty over Indian matters, which was thereby "committed exclusively to the government of the Union." *Id.* at 561. See also, e.g., *Oneida II*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law"). It may be that this surrender received "virtually no attention" from the Framers (Pet. Br. at 15), but undeniably "[i]t is one of the powers parted with by the States and vested in the federal government." *Worcester*, at 594 (McLean, J., concurring).

mestic sovereigns, existing inside "the structure of the Union," and should be understood to have the right to bring suit against a state comparable to the right enjoyed by the other domestic sovereigns.

As with suits against states by the United States and their sister states, federal-question suits by Indian tribes are "inherent in the plan of the Union" (*Monaco*, 292 U.S. at 330) and "essential to the peace of the Union" (*id.* at 328). "While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan." *Id.* at 329.⁶⁴

C. Alternatively, Federal-Question Suits By Indian Tribes Against States Are Authorized By 28 U.S.C. § 1362, And State Sovereign Immunity Is No Bar

If the Court decides, that without more, the Eleventh Amendment does apply to federal-question suits by Indian tribes, it remains to be determined whether Congress has nonetheless authorized such suits. This question can only be understood in the context of the United States' unquestioned power to sue the states on behalf of the Indian tribes. *United States v. Minnesota*, 270 U.S. 181 (1926). One way to state the question is to ask whether Congress has statutorily abrogated the states' sovereign immunity to suits by Indian tribes. But a more accurate way is to ask whether

⁶⁴ Petitioner argues that it would somehow be "unfair" if the Eleventh Amendment were held to be inapplicable to suits by tribes against states, yet, because of the unique nature of their retained sovereignty, the tribes would continue to enjoy immunity from suits brought against them by the states. Pet. Br. 21 n.25; The alleged unfairness, if there is any, occurred two centuries ago with the states' surrender of their sovereignty over Indian matters in the plan of the convention, and (to adapt the Court's statement from a similar context) simply "is a necessary consequence of [the tribes'] role in a system of [treble] sovereignties." *Welch*, 483 U.S. at 488 (plurality opinion). That the tribes are not obliged to surrender their sovereign immunity just because the states have none to relinquish when sued by tribes, is the natural result of a federal structure in which the United States as trustee for Indians may sue the states, *United States v. Minnesota*, 270 U.S. 181 (1926), but at the same time the states may not sue the United States in its capacity as trustee for Indians. *Minnesota v. United States*, 305 U.S. 382 (1938).

Congress has delegated to the tribes themselves the power that the United States has always had to sue on the tribes' behalf. The question is thus not whether the states' immunity has been overridden by Congress, but rather whether the Indian tribes have been authorized by Congress to exercise in a different form a power that is conceded already to exist.

In *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1975), the Court unanimously construed 28 U.S.C. § 1362⁶⁵ as authorizing Indian tribes to bring federal-question suits against states by name in the federal courts.⁶⁶ In particular, the Court held that the "broad jurisdictional barrier" of the Tax Injunction Act (*id.* at 470) did not preclude the exercise of jurisdiction over the Tribe's claims for declaratory and injunctive relief against a state's collection of sales and personal property taxes. *Id.* at 474-475.

The Tax Injunction Act (28 U.S.C. § 1341), and "the pre-existing federal equity practice" which it incorporates (*id.* at 470), "reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 103 (1981).⁶⁷ Nonetheless, the Court

⁶⁵ Quoted in n.13, *supra*.

⁶⁶ The named defendants in the consolidated cases reviewed in *Moe* were the State of Montana, the State's Department of Revenue and its director, and various county sheriffs. 425 U.S. at 467 n.4 and 468 n.7. Even though the Court dealt only with the Tribe's claims for declaratory and injunctive relief (and not the claims of individual tribal members for tax refunds), *id.* at 468 n.7, under the doctrine of the Eleventh Amendment, if applicable, naming a state and one of its departments or agencies as parties defendant is absolutely prohibited, and "[t]his bar exists whether the relief sought is legal or equitable." *Papasan v. Allain*, 478 U.S. at 276; accord, e.g., *Pennhurst*, 465 U.S. at 100; *Florida Dept. of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (*per curiam*); *Alabama v. Pugh*, 438 U.S. 781 (1981) (*per curiam*).

⁶⁷ Prior to the enactment of § 1341, the Court had adopted the "principle of comity" and applied it to foreclose actions "brought to enjoin the collection of a state tax in the courts of a different, though paramount

in *Moe*, relying on the legislative history of § 1362,⁶⁸ held that Congress had set aside these powerful federalism con-

[federal] sovereignty." *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). The principle is based on "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations" *Id.*

⁶⁸ See H.R. REP. NO. 2040, 89th Cong., 2d Sess. 2-3 (1966), reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 3147. In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559 (1983), in which states had been sued by tribes (as well as separately by the United States) in federal court, the Court, relying on § 1362 as the basis of jurisdiction over the tribes' claims, held that it was "clear" that "the federal courts had jurisdiction here to hear the suits brought both by the United States and the Indian Tribes." The Court said (*id.* at 559-60 n.10):

Congress contemplated that § 1362 would be used particularly in situations in which the United States suffered from a conflict of interest or was otherwise unable or unwilling to bring suit as trustee for the Indians, and its passage reflected a congressional policy against relegating Indians to state court when an identical suit brought on their behalf by the United States could have been heard in federal court.

The legislative history of the statute cites *Yoder v. Assiniboine & Sioux Tribes of Fort Peck Indian Reservation*, 339 F.2d 360 (9th Cir. 1964), as "exemplif[ying] the difficulties encountered by Indian tribes" which would be overcome by the enactment of § 1362. H.R. REP. NO. 2040, *supra*, at 3. (*Yoder* was an action by the Tribe against the Montana Oil and Gas Commission seeking to enjoin state regulation of tribal lands; the Ninth Circuit dismissed the case because of failure adequately to establish the \$10,000 "amount in controversy" requirement of the general federal-question jurisdictional statute (28 U.S.C. § 1331) as it then read.) The House Report (at p. 3) stated that "[t]he judicial determination of controversies concerning such lands commonly is committed to the Federal courts," citing *Minnesota v. United States*, 305 U.S. 382 (1938). (The later case, in turn, was an action brought by the State against the United States in State court to condemn individual Indian allotments for a highway right of way; the case was removed to federal court. On review, this Court affirmed a judgment dismissing the case, holding that the United States, in its capacity as trustee for the Indians, was immune from suit in a state court, absent the consent of Congress. The Court noted that jurisdiction over such controversies "has been commonly committed exclusively to federal courts." *Id.* at 389.) It is thus plain beyond peradventure that Congress understood that the jurisdiction § 1362 conferred upon suits by Indian tribes would involve litigation brought by

cerns in favor of access by Indian tribes to federal judicial relief from state taxing schemes. The Court reasoned that Congress intended to confer upon the tribes a power to bring federal-question suits against states in federal court that "would be at least in some respects as broad as that of the United States suing as the tribe's trustee." 425 U.S. at 473; *id.* at 474 (legislative history "suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf").⁶⁹ And since the Tax Injunction Act would not have operated against the United States had it sued on the Tribe's behalf,⁷⁰ the Tribe's suit likewise was not barred. *Id.* at 474-475.

Although *Moe* did not involve an Eleventh Amendment defense, it construed § 1362 as overriding a jurisdictional limitation reflecting the same fundamental considerations of federalism as those which animate the doctrine of state sovereign immunity. Equally important, *Moe* construed the statute as authorizing Indian tribes to bring federal-question actions against the states *qua* states to the same extent as the United States suing in their behalf. Since the United States can sue a state on behalf of an Indian tribe without regard to the Eleventh Amendment, *United States v. Minnesota*, *supra*, 270 U.S. at 195 (citing *United States v. Texas*,

⁷⁰ *Id.* against states, if nothing else, as the only two cases cited in the Committee reports involved litigation in which states were parties opposed to Indian interests.

⁶⁹ The obvious "respects" in which § 1362 does not confer jurisdiction over tribal suits are those in which no federal question is raised. See, e.g., *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980) (no § 1362 federal-question jurisdiction over a tribe's state-law breach-of-contract claim, even though the United States could have brought the suit on the tribe's behalf pursuant to 25 U.S.C. § 175), *cert. denied*, 451 U.S. 911 (1981).

⁷⁰ The Court cited *Department of Employment v. United States*, 385 U.S. 355 (1966), in which the Court held not only that the Tax Injunction Act did not restrict a suit against a state, but also expressly rejected the State's contention in that case "that the State of Colorado has not consented to suit in a federal forum even where the plaintiff is the United States." *Id.* at 358.

supra), just as the United States can sue a state without regard to the Tax Injunction Act, it follows that the Amendment should not bar a tribe suing in its own behalf.⁷¹

Petitioner and *amici* argue, however, that this result is forbidden by the "clear statement" rule of the Court's recent decisions, which require that "evidence of congressional intent [to supplant state immunity] must be both unequivocal and textual." *Dellmuth*, 109 S. Ct. at 2401. The argument should be rejected because the Court's construction of the statute as authorizing suits by tribes against states satisfies the "clear statement" rule, or because the rule is inapplicable, or because neither the rule nor its parent (the Eleventh Amendment) is applicable to a congressional delegation to tribes of the United States' trust authority to sue states.

1. The intent of the statute to subject states to suit by Indian tribes satisfies the clear-statement rule

This Court unanimously construed § 1362 in *Moe* as authorizing Indian tribes to bring federal-question suits against states *eo nomine* to restrain the collection of state taxes. The Court then held that § 1362 displaces the important jurisdictional policy of the Tax Injunction Act, which reflects paramount considerations of federalism comparable to those said to underlie the Eleventh Amendment. In the intervening fourteen years between the decision in *Moe* and the decision of the Ninth Circuit below, at least eight lower federal courts have ruled, on the basis of *Moe*'s reasoning,

⁷¹ Petitioner does not contend that the United States, in furtherance of the federal policy of tribal self-government and self-determination, could not have brought this action on behalf of respondent tribes, to secure their treatment by the State as federally recognized Indian tribes rather than as "racially exclusive groups," and we think it clear that the government could have brought the suit. See *Moe*, 425 U.S. at 473-74 & n.13. We therefore take no position on § 1362's effect on state sovereign immunity in a tribal suit in which the United States would not have standing to sue as tribal trustee.

that § 1362 overcomes the Eleventh Amendment defense of the states.⁷² During this period, Congress has not seen fit to amend § 1362, or to express in any way its disapproval of either *Moe* or the lower court decisions applying its rationale to the Eleventh Amendment.

The statute authorizes tribal suits against states to enjoin the states from collecting taxes for the general treasury, and no ground has been advanced that would justify the Court in revisiting *Moe*. See, e.g., *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning"). Under these circumstances the "clear statement" rule is satisfied by the statutory authorization of § 1362 to sue a state. As there is no requirement that Congress mention either the Eleventh Amendment or state sovereign immunity in the statute,⁷³ the purpose of the "clear statement" rule is surely fulfilled by congressional

⁷² See *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079-80 (2d Cir. 1982); *Red Lake Band of Chippewas v. City of Baudette*, 730 F. Supp. 972 (D. Minn. 1990); *Navajo Nation v. New Mexico*, 14 Indian L. Rep. 3047 (D.N.M. 1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 595 F. Supp. 1077 (W.D. Wis. 1984); *Marty Indian School v. South Dakota*, 592 F. Supp. 1236, 1237 (D.S.D. 1984); *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1307 (N.D.N.Y. 1983); *Charrier v. Bell*, 547 F. Supp. 580, 585 (M.D. La. 1982); *Confederated Tribes of the Colville Indian Reservation v. Washington*, 446 F. Supp. 1339, 1134-50 (E.D. Wash. 1978) (three-judge court), *rev'd in part on other grounds*, 447 U.S. 134 (1980); *Native Village of Tyonek v. Puckett*, No. A82-369 Civil, op. tr. at 17 n.17 (D. Alaska 3 Dec. 1986) (*dictum*), *aff'd in part, rev'd in part on other grounds*, 890 F.2d 1054 (9th Cir. 1989), *cert. pending*, No. 89-609; *Aguilar v. Kleppe*, 424 F. Supp. 433 (D. Alaska 1976) (*dictum*). See also the Annotation on point at 65 ALR Fed. 649 (1983). Cf. *Lac Courte Oreilles Band v. Wisconsin*, No. 74-C-313-C (W.D. Wis. Oct. 11, 1990) (decided after this Court's grant of review in this case).

⁷³ See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. at 2277-80 (plurality opinion); *id.* at 2295-96 (Scalia, J., concurring in relevant part); *Dellmuth*, 109 S. Ct. at 2403 (Scalia, J., concurring); cf. *Port Authority Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868, 1873 (1990).

authorization of federal-court actions to prevent the collection of state taxes—"the life-blood of government"⁷⁴—a remedy that impacts the state treasury much more dramatically than an award of money damages. See, e.g., *McKesson v. Florida Div. of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990).

2. The clear-statement rule is inapplicable in light of the "contemporary legal context" of § 1362's enactment

When § 1362 was enacted in 1966, this Court's 1964 decision in *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), controlled the question of what statutory language was required for Congress to override a state's Eleventh Amendment immunity. In *Parden* the Court found intent to authorize suits against states in language no more specific than words broadly subjecting "every common carrier by railroad" to suit in federal court. The Court specifically declined to adopt the clear-statement rule advocated by Justice White's four-justice dissent. *Id.* at 198-200. *Parden* was recently overruled on this point by *Welch*, 483 U.S. at 478 (1987), but such was not the law in 1966 when Congress enacted § 1362.

Where, as here, the Court has adopted a new rule of statutory construction, it has also taken into account the presumption that Congress would have relied upon the old rule as a guide to its contemporary choice of statutory language. The Court has accordingly paid Congress the deference of "tak[ing] into account [the] contemporary legal context" in which Congress acted prior to the change in ground rules.⁷⁵

⁷⁴ *Bull v. United States*, 295 U.S. 247, 259-60 (1935).

⁷⁵ *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1982); *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381 (1982). Those two cases required the Court to decide whether to imply private causes of action from statutory schemes that were silent on the subject. The statutes in question were enacted prior to *Cort v. Ash*, 422 U.S. 66 (1975), in which the Court had broken from precedent and charted a new and more exacting course, calling for Congress to be explicit in the

The Court touched on this issue in *Dellmuth*, 109 S. Ct. at 2401, in which it addressed the dissent's criticism of applying the "clear language" rule to a statute enacted in 1975. The Court did not reject the validity of the contemporaneous-legal-context principle, but emphasized that the enacting Congress in 1975, "taking careful stock of the state of Eleventh Amendment law," would know that it had to do more than "drop coy hints" that it intended to abrogate the states' Eleventh Amendment immunity. 109 S. Ct. at 2401.⁷⁶ The 1966 Congress, on the other hand, had nothing to take stock of on this question except the 1964 decision in *Parden*. Under that standard, the language of § 1362, in the context of Congress' plenary and exclusive authority over the subject, would clearly suffice to encompass suits against states and demonstrate congressional intent to authorize such suits.

Congress certainly knew that, historically, tribes had been forced to turn to the federal courts for protection, and more often protection from state action than from private action. The only two cases cited in the legislative history of § 1362 involved litigation with states, and Congress knew that state-tribal issues arising under federal law were among, and probably formed the majority of, the types of suit the tribes would bring under the new section. See note 68, *supra*. The traditional distrust of states and state courts was also a factor in enacting the statute: the tribes were not to be relegated to bringing their claims in state courts.⁷⁷

creation of private remedies. In both *Cannon* and *Curran*, however, the Court implied causes of action under the pre-*Cort* precedents, in deference to the "contemporary legal context" in which Congress had acted.

⁷⁶ In obvious tension with *Parden*, the Court in *Employees v. Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973), had foreshadowed the clear-statement rule by requiring Congress to "indicat[e] in some way that the constitutional immunity was swept away."

⁷⁷ *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559-60 n.10 (1983). "There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated." S. REP. NO. 1507, 89th Cong., 2d Sess. 3 (1966). "[T]he Department of

In this context, an older rule of statutory construction—one grounded in equally long-standing and honor-bound principles—is applicable: Indian legislation is to be interpreted to favor the establishing of Indian rights and resolving ambiguities in favor of the Indians.⁷⁸ In these special circumstances of § 1362's enactment and purpose, the "clear statement" rule should be deemed inapplicable.

3. Neither the Eleventh Amendment nor its "clear statement" rule are applicable to § 1362's delegation to Indian tribes of the trust authority of the United States to sue states on behalf of tribes.

The rationale for Eleventh Amendment immunity and its "clear statement" rule—that denial of state sovereign immunity upsets the fundamental constitutional balance between the federal government and the states—is simply lacking here. The State is not exposed under § 1362 to claims from which it would otherwise enjoy immunity, or even expect not to be sued, because such suits can be and often have been brought by the United States to fulfill its role as trustee. In this truly "sui generis" constitutional field of Indian affairs (Pet. App. B19), there is no basis for imposing special restrictive drafting rules on Congress with respect to authorizing tribes to sue states, nor even a basis for presuming the existence of state immunity. The United States, pursuant to its judicially created trust obligations, may invoke the federal judicial power against states on

the Interior indicated that a tribe's desire to have a Federal forum for matters based upon Federal questions is justified." H.R. REP. NO. 2040, 89th Cong., 2d Sess. 3 (1966), reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 3146. "The issues involved are Federal issues and the tribes should not be required to conduct the litigation in the State courts." Dec. 22, 1965 letter from Ass't Sec. of Interior Harry R. Anderson to Sen. Eastland, included in H.R. REP. NO. 2040, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 3148 (referring to tribal lands cases).

⁷⁸ See, e.g., *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 149 (1984); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

behalf of tribes on the basis of nothing more than the general jurisdictional grant of 28 U.S.C. § 1345.⁷⁹ The states undeniably ceded that power. It necessarily follows that they relinquished to Congress the power to delegate that litigation authority to the tribes. The states retained no right, sovereign or otherwise, to object to Congress' determination of the manner in which its trust obligations will be fulfilled.

As *amici* Council of State Governments, et al., have suggested the question:

[Given the states' surrender to national legislative power of all sovereignty over Indian affairs and relations, is it not] arguably a matter of far less consequence whether such law is to be enforced through suit by the United States; by the United States "*ex rel.*" a tribe or individual; or directly by an individual or tribe in its own name pursuant to congressional authorization?

State Governments Br. 13. *Amici*, of course, say that having conceded so much power to the national legislature, they have the right in return to insist upon a clear-statement rule. But the fulcrum which the Constitution set in place with respect to Indian relations, as in no other field of national endeavor, established a different balance.

The allocation of power made by the Constitution in this field leaves so little room for state authority that this Court could say to Kansas in 1867, for example, that federally recognized Indian tribes are

to be governed exclusively by the government of the Union. If under the control of Congress from necessity, there can be no divided authority There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on

⁷⁹ "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States. . . ."

condition that the Indian rights would remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union.

The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-56 (1867). A more complete defeasance of state sovereignty is hard to imagine.

The uniqueness of the constitutional scheme of tribal relations, however, is not the exclusion of state authority alone. It is a combination, rather, of that diminution of state sovereignty, the acknowledgment of the tribes as the third source of sovereignty under the constitutional plan, and the trust relationship between the sovereign tribes and the superior sovereign Union grounded in honor and morality, and enforced by law. The United States has no trust or other duty to sue one sovereign state on behalf of another, but it does have such an obligation to sue a state on behalf of an injured tribe. The power and its exercise are undisputed. The states are not heard to complain when Justice Department lawyers initiate litigation against them on behalf of tribes, nor do the states have standing to object when the government contracts such legal representation out to private lawyers.⁸⁰

If the constitutional balance is not upset in those circumstances, it cannot be upset when Congress authorizes the

⁸⁰ The Justice Department is not infrequently conflicted out or for policy reasons declines to litigate on the tribes' behalf. See Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STANFORD L. REV. 1213 (1975). In these instances the BIA, in the exercise of its trust responsibility, grants tribes hundreds of thousands of dollars annually to hire private attorneys to prosecute cases which the government for various reasons has declined to bring. See BIA regulations authorizing government payment of the fees of tribal attorneys when "the Attorney General refuses assistance or advises that assistance is not otherwise available," 25 C.F.R. § 89.41(a); "the Solicitor is unable to provide representation due to a conflict of interest or other reasons," *id.* at (b); "the Solicitor . . . determine[s] that the services of his office are not available." *Id.* at (c).

tribes to bring such suits on their own initiative. Because of the tribes' sovereign status and the fiduciary relationship between them and the government, Congress may, without disrupting the federal/state balance, delegate its legislative power to the tribes as to subjects over which the tribes possess retained sovereign authority. *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975). May Congress not similarly delegate to the tribes the United States' trust-based litigation authority to sue states, also without disturbing the constitutional balance *vis-a-vis* the states?

The Court implicitly resolved this issue in *Arizona v. California*, 460 U.S. 605 (1983), in which tribes were allowed to intervene as plaintiffs in an original action brought in this Court against states by the United States. Although the tribes were seeking more expansive relief than the United States was seeking on their behalf (*see id.* at 626), the Court rejected the states' Eleventh Amendment objections to intervention by the tribes. The Court held that "our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Id.* at 614.⁸¹

All Congress has done in § 1362 is to delegate to the tribes the power to bring their own suits rather than require their continued reliance on the vicissitudes of the United States' trust responsibility. That action has no discernible impact on the federal structure, and signifies no change in the federal/state relationship, because the states surrendered the power completely and exclusively in the plan of the Convention. Recognition that in § 1362 Congress has authorized tribal suits against states leaves the doctrine of Eleventh Amendment immunity and its corollary "clear statement" rule entirely intact. The Court would be recon-

⁸¹ In support of that disposition, the Court cited *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981), which holds that in original actions the Eleventh Amendment is no bar to suits between sister states, unless "the plaintiff State is actually suing to recover for injuries to specific individuals."

firming only what *Moe* held: that Congress enacted a statute that, properly interpreted in light of the long history of relations between Indian tribes and the federal government, and with due regard for the structure and requirements of the federal system, entitles the tribes to have tribal/state disputes resolved in the federal courts.

CONCLUSION

For all of the reasons set forth above, the judgment below should be affirmed.

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In The
Supreme Court of the United States
October Term, 1989

DAVID HOFFMAN, COMMISSIONER,
DEPARTMENT OF COMMUNITY
AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioners,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

On Writ Of Certiorari To The United
States Court Of Appeals
For The Ninth Circuit

**BRIEF FOR THE RESPONDENT
CIRCLE VILLAGE**

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QUESTIONS PRESENTED

1. Whether enactment of the Alaska Native Claims Settlement Act recognized the tribal status of Circle Village and other villages denominated in the statute.
2. Whether the Eleventh Amendment presents a bar to a suit by an Indian tribe bringing suit under 28 USC 1362.

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No. 89-1782

In The
Supreme Court of the United States
October Term, 1989

DAVID HOFFMAN, COMMISSIONER,
DEPARTMENT OF COMMUNITY
AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioners,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

On Writ Of Certiorari To The United
States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENT
CIRCLE VILLAGE

COUNTER STATEMENT OF CASE

Circle Village adopts the Counter Statement of the Case
offered by Noatak as its own.

SUMMARY OF ARGUMENT

1. Alaska's argument that the Courts must review the tribal status of Circle under criteria set out in 25 C.F.R. Part 83 lacks precedential support. Generally, the test articulated by Alaska as to tribal status is used with regard to tribes to which Congress and the Executive Branch have been silent. This is not the case for Circle.

1a. A long line of cases hold that Congress may recognize tribal status, and that such a determination will not be disturbed unless the action fails to relate to Congress' unique obligation toward Indians. In this case, Congress had dealt with Circle as a tribe in settling the Alaska Native Claims Settlement Act. Only tribes have aboriginal claims to land which may be settled outside the constitutional mandates of fair and adequate compensation. While ANCSA was a generous settlement in relation to other claim settlements, it was a settlement of aboriginal claims. Since Circle participated in that settlement it is axiomatic that Circle must be a tribe.

1b. Alaska argues that the Secretary has not recognized Circle. This is factually incorrect. Circle, as well as Noatak, appear on the 1st of recognized tribes published pursuant to 25 C.F.R. Part 83. Alaska attempts to confuse the matter regarding the inclusions of ANCSA corporation on the most recent list. Their inclusion, however, does not abrogate the prior recognition, and is not inconsistent with tribal status of the village councils. Moreover, subsequent enactments of Congress have carried forward to this policy by treating ANCSA villages as tribes for most major pieces of Indian legislation since ANCSA.

1c. Even apply Alaska's test, Circle easily meets the test of a historical Indian tribe.

2a. Alaska and other States argue that such suits by an Indian tribe are barred by the Eleventh Amendment. They argue that the Court implied a waiver of Eleventh Amendment rights in 28 U.S.C. 1362. This is not necessarily the case. The statute is more in the nature of a delegation of federal power to the tribes, and as such does not abrogate any right of the State, since the states have no immunity vis-a-vis the federal government.

2b. Moreover, the statute is a valid exercise of Congressional power over Indian affairs. The context gives rise to tension between Congress' power over Indian affairs and the States' rights under the Eleventh Amendment. Given the historically unequal status of tribes vis-a-vis the States, the tension between these two provisions of the Constitution are best resolved in upholding Congress' authority to protect Indian interests.

ARGUMENT

I. CIRCLE VILLAGE IS AN INDIAN TRIBE.

The Circuit Court of Appeals held that Circle Village was an Indian Tribe within the meaning of 28 U.S.C. Section 1362. The holding was principally based upon the inclusion of Circle within the Alaska Native Claims Settlement Act, [ANCSA] 43 U.S.C. Section 1610(b)(1), and subsequent enactments of Congress.

Alaska argues that the Court employed the wrong test to determine whether Circle is a tribe. They argue that:

"When an Indian Group is not on the Secretary of the Interior's list of acknowledged tribes, as respondents are not, existing law requires a factual examination using either the criteria in the Federal Acknowledgment Process, 25 C.F.R. Part 83, or similar criteria in case law." Appellant's Brief at 28.

The argument is legally incorrect and somewhat factually misleading because 1) the State omits the legal principle that the Congress can recognize the existence of an Indian tribe and that this action is binding upon both the Executive and Judicial branches of the Federal Government, and that Congress has recognized Circle by enacting ANCSA and subsequent legislative enactments, 2) the Secretary has recognized the village of Circle as an Indian tribe, and 3) Circle's status as a tribe is easily demonstrable by readily ascertainable evidence contained in Government and other records.

A. Congressional Recognition Of Tribal Status Is Sufficient And Has Occurred With Regards To Circle.

The Court of Appeals correctly held that Congressional recognition is sufficient to establish tribal status and that such recognition is binding upon the Executive Branch. Congressional recognition of tribal status is accomplished in many ways, including the settlement of aboriginal land claims. Only tribes may have cognizable land claims based upon aboriginal title. Individual

Indians have no such rights.¹ ANCSA was a settlement of aboriginal land claims, and since Circle and Noatak were specifically included as Native groups whose claims were settled by the terms of the statute, the statute amounts to Congressional recognition. Moreover, subsequent Congressional enactments treating ANCSA villages as tribes, evince a continuing federal policy to extend this recognition to Circle, Noatak and similarly situated Alaska Native villages.

1) Congress has plenary power over Indian affairs which includes the power to extend recognition of tribal status and to reorganize tribal institutions.

As a general principle, Congress has broad power over Indian affairs. This power has been described as "plenary", however, it is not absolute. *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977); *Morton v. Mancari*, 417 U.S. 535 (1974). Nonetheless, a long line of cases hold that this broad "plenary" power of Congress includes the authority to recognize the existence of Indian tribes. *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866); *Montoya v. United States*, 180 U.S. 261 (1901); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977). This power is derived from the Constitutional

¹ Cf. *United States v. Dann*, 873 F.2d 1189, 1198 (9th Cir. 1989), cert. denied, 107 L. Ed. 2d 185 (1989) (upholding an individual right of occupancy). This right was, however, limited to non-tribal lands occupied by individual Indians prior to 1934, which is obviously not the situation of the Native Villages asserting pre-ANCSA claims. They asserted claims as tribes not individual Natives.

empowerment contained in the Indian Commerce Clause, which provides that Congress shall "regulate Commerce . . . with the Indian Tribes." U.S. Const. Art. I, Section 8, cl. 3. This is not to say that Congress has the exclusive power to determine tribal status. As the Petitioners claim, the Secretary of the Interior and the Courts have exercised this power, *infra*. However, the line of cases noted above, hold that the Constitution vests ultimate authority for determining tribal status in Congress.

In exercising this power, Congress has seldom applied ethnological standards of a purely scientific quality. Congress has consolidated/confederated different tribes into one tribal entity, and has subdivided other tribes into subgroups and recognized each sub-group as a separate tribe. See Cohen, *Handbook Of Federal Indian Law*, 6 (1982 Ed.). The Athabascans present a relevant case in point. Ethologically speaking, Athabascans are the same people as the Navaho, and are sometimes referred to as the Northern Navaho.² The Navaho, however, are organized into a single tribe, with tribal subdivisions called "chapters," which, as a practical matter, are the same as Athabascan villages. conversely, Athabascan villages are recognized as separate tribes, however, the tribes coordinate services through a single regional

² Carl Waldman, *Encyclopedia of North American Tribes*, pp. 25-26 (1988). As a curious aside, there is an ancient Navaho prophesy that holds that the end of the world will occur when the Northern Navaho and the Southern Navaho are united in a single nation. The prophesy is not shared by the Athabascans, who sometimes express wonder at the unwillingness of older Navahos to meet.

non-profit agency. The difference is merely a reflection of different histories.

The practical effect of recognition of tribal status is somewhat analogous to the *de jure* recognition of a foreign government in international law, i.e. while a *de facto* government exists and has certain rights recognized by law, a *de jure* government is accorded the full rights of a foreign government under U.S. law. *Baker v. Carr*, 369 U.S. 186 (1962). So, it is similar with an unrecognized tribe.

Tribes not recognized by the federal government remain tribes in an ethnological sense. For example in *Joint Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the Court held that despite the fact that a tribe had not been recognized, it was still a tribe within the meaning of the Non-Intercourse Act of 1790. Similarly, tribes who have either never been recognized, or whose recognition has been terminated, may continue to have standing in Court. *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Tribes whose recognition have been terminated may continue to retain hunting and fishing rights, *id.*, and may in fact have recognition restored at a latter day by a pattern of Congressional action or express restoration. See *United States v. John*, 437 U.S. 634 (1978); 25 U.S.C.A. 903 *et seq.*

In contrast, recognized tribes enjoy a government to government relationship with the United States and the full panoply of immunities and privileges available to federally recognized tribes, 25 C.F.R. Sections Parts 83.6, 83.11. These include services provided under the Snyder Act (25 U.S.C. Section 13), Johnson-O'Malley Act (25

U.S.C. Section 452 *et seq.*), Indian Financing Act (25 U.S.C. Section 1451 *et seq.*), and the grants and contracts under the Indian Self-Determination Act (25 U.S.C. Section 450 *et seq.*), and the Indian Child Welfare Act (25 U.S.C. Section 1901 *et seq.*), as rights under a variety of other federal statutes. In the context of this case, recognition of tribal status includes the right to invoke federal court jurisdiction under 28 U.S.C. Section 1362.

2) Congressional recognition is a non-justiciable issue, binding upon the Judicial and Executive Branches.

This Court has long held that the recognition of tribal status is a non-justiciable political issue. In *United States v. Holliday*, 70 (3 Wall.) 407, 419 (1866) this Court stated:

In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

This doctrine was further explained in *United States v. Sandoval*, 231 U.S. 28, 46 (1913) when the Court stated:

Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes . . . are to be determined by Congress, and not by the Courts.

In reviewing the general doctrine of the justiciability of political questions, the Court in *Baker v. Carr*, 369 U.S. 186, 684-5 (1962), reiterated these principles in extensive dicta, and subsequently held the same in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977) holding that

the legislative judgement (of Congress) should not be disturbed "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . .

In that case, the Court deferred to the Congressional recognition of two bands of Delaware Indians as two separate tribes and Congressional refusal to recognize a third band as a tribe.

Some of the early cases hold that judicial deference is to be given to actions of both the Congress and the Executive in recognizing tribes. It is difficult to determine which branch predominates in this respect. Subsequent termination cases, however, deny the power of the Secretary to terminate tribes independent of Congressional authority. The Courts have held that the Secretary's action to terminate a tribe must be authorized by Congressional statute, and that the failure of the Secretary to strictly carry out the procedures set forth by Congress invalidate the Secretary's actions to terminate a tribe. See *Cohen, supra*, at 813-814. Thus, while tribal recognition maybe extended by either the Congress or the Executive, a tribe may only be terminated by Congress. The implication is obvious: Congressional action in tribal recognition

matters predominates. This is consistent with the Constitutional grant of authority over Indian affairs to Congress, and the general function of the Executive Branch to carry out the legislative actions of the Congress.

3) The Court Of Appeals Correctly Held That Settlement Of Aboriginal Land Claims Constitutes Congressional Recognition.

Congress may act in a variety of ways to extend recognition to a tribe. In rare cases, Congress has simply passed a law which expressly extends recognition to a tribe, such as in the restoration of termination tribes.³ More commonly, however, recognition flows from Congressional interaction with a tribe.

Of greatest relevance to the present case is *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977). The case involved a dispute between three bands of Delaware Indians over a judgment fund from the Indian Claims Commission in settlement of certain land claims. Two of the bands, the Absentee Delawares and the Cherokee Delawares, were included in the Congressional appropriation for settlement of the claim. Of these two bands, the first was specifically federally recognized prior to the judgment, while the second tribe was recognized by Congressional legislation providing for certain

³ See Menominee Restoration Act (25 U.S.C. Section 903 *et seq.*) Siletz Restoration Act (25 U.S.C. Section 711 *et seq.*), Oklahoma Indians Restoration Act (25 U.S.C. Section 861 *et seq.*); Paiute Indian Tribe of Utah Restoration Act (25 U.S.C. Section 761 *et seq.*)

payments to the tribe. The third group, the Kansas Delawares, had not been the subject of prior Congressional action and were excluded from the land claims settlement legislation. This Court held that the tribes included within the settlement legislation were recognized tribes, while the excluded tribe was not. In reaching this conclusion, the Court noted that land claims were in fact tribal claims, and are a means of compensating a tribal entity for wrongful acts perpetrated against it, *id.* at 184. The Court noted that the Indian Claims Commission was only empowered to hear claims brought by an "Indian tribe, band, or other identifiable group." *id.*, citing 25 U.S.C. Sections 70a, 70i; *Minnesota Chippewa Tribe v. United States*, 161 Ct.Cl. 258, 270-271, 315 F.2d 906, 913-914 (1963).

The following year, this Court decided *United States v. John*, 437 U.S. 634 (1978), involving two bands of Choctaws: the "main" band which was removed from Mississippi and Georgia during the 1830's via the "Trail of Tears" to Oklahoma, and which had long been recognized, and the remnant band of Choctaws which had remained in Mississippi. This latter band had not been recognized until 1916, when Congress began to appropriate small sums of money "to investigate the condition of Indians living in Mississippi." From this beginning, federal involvement in the affairs of this band grew, and from this course of dealing, the Court found that the Mississippi Choctaw was a tribe.

- 4) ANCSA necessarily recognized the tribal status of Circle and Noatak and similarly situated Alaska Native villages by compensating them for the aboriginal claims which ANCSA extinguished.

As noted in the *Delaware* case, it is axiomatic that the only Native groups which may assert claims of aboriginal title are Indian tribes, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), this Court unhesitatingly affirmed that southeast Alaska Natives possessed tribal status and aboriginal title to the lands they occupied.⁴ *Id.* at 273, 275, 279, 282, 285, 287. Subsequent cases confirmed this conclusion.⁵ The rule that only

⁴ For earlier cases to the same effect, see *United States v. Ferrigan*, 2 Ak. Rpts. 442, 447-51 (D. Alaska 1905); *United States v. Cadzow*, 5 Ak. Rpts. 125, 125-29 (D. Alaska 1914). This later case held that the G'witchen Athabascan of Fort Yukon possessed the status of Indians.

⁵ In *Tlingit and Haida Indians of Alaska v. United States*, 177 F.Supp. 452 (Ct. Cl. 1959), the court of claims held that the Tlingit and Haida Indians held aboriginal title which had not been extinguished by the Treaty of Cession. In *Edwardson v. Morton*, 369 F.Supp. 1359 (D.D.C. 1973) a federal district court held that prior to ANCSA, Alaska Natives held "rights based on aboriginal title," *Id.* at 1373, which the United States as trustee was required to protect against trespass. The federal government accepted the ruling and filed suit against the alleged trespassers. *United States v. ARCO*, 612 F.2d 1132, 1139 (9th Cir. 1980) *cert. denied*, 47 U.S. 888 (1980). The court, however, dismissed this case on the ground that ANCSA had extinguished all claims based on aboriginal title, which precluded any trespass claim.

tribes may hold aboriginal title, therefore, compels the conclusion that Alaska Native Villages hold tribal status.⁶

In ANCSA congress ratified a negotiated land settlement agreement between the United States and Alaska tribes.⁷ Thus, ANCSA is a "treaty substitute."⁸ Like most Indian treaties, its purpose, "was to obtain Indian lands", Cohen, *supra*, at 66, and Congress dealt with Alaska Natives in the same way it dealt with "Lower 48" Indians.⁹ As a treaty substitute, ANCSA is subject to the same canons of construction as Indian treaties.¹⁰ These canons require that Indian treaties be construed as the Indians would have understood them and that ambiguities be resolved in favor of the tribes. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 174 (1973).

⁶ See, Smith and Kancewick, *The Tribal Status of Alaska Natives*, 61 Col. L.R. 455, 496-98.

⁷ "Once ratified by Act of Congress, the provisions of the agreements become law, and like treaties, the Supreme law of the land." *Antoine v. Washington*, 420 U.S. 194, 204 (1975).

⁸ C. Wilkinson, *American Indians, Time, and the Law*, at 64 (1987).

⁹ H.R. Rep. 92-523, 92nd Cong., 1st Sess., at 4 (1971). The consistent policy of the United States in its dealings with Indian tribes has been to grant to them title to a portion of the lands which they occupied, to extinguish the aboriginal title to the remainder of the land by placing such land in the public domain, and to pay the fair value of the title extinguished. This treatment of Alaskan Natives on the same basis as other tribes subject to U.S. authority is in fulfillment of the Treaty of Cession whereby the U.S. acquired Alaska from Russia. See 15 Stat. 539.

¹⁰ *Antoine*, 420 at 199-200.

That both Alaska Natives and Congress understood ANCSA to recognize and settle the *tribal* land claims of Native villages is evident from both the act and its legislative history. As noted by the Petitioners, Congress defined "Native Villages" in ANCSA in broad terms as

any tribe, band, clan, group, village, community, or association in Alaska.

43 U.S.C. Section 1602(c). The language is remarkably similar to the language contained in the Indian Claims Commission Act which this Court held to refer to tribes in *Delaware Tribal Business Committee v. Weeks*, *supra*. ANCSA vested settlement benefits in village and regional corporations formed "by" the "member[s]" of the Village "for and on [their] behalf"¹¹. 43 U.S.C. Section 1607.

¹¹ See, 43 U.S.C. Section 1602(j) (defining "Village Corporation" as a corporation which acts "for and on behalf of a Native Village") (emphasis added); and 43 U.S.C. Section 1611(a)(1) (authorizing "the Village Corporation for each Native Village" (emphasis added) to make selections under the Act); and 43 U.S.C. Section 1602 (defining "Native" as including "any citizen of the United States who is regarded as an Alaska Native by the Native Village or Native group of which he claims to be a member") (emphasis added); 43 U.S.C. Section 1610(b)(1) (listing the Native Villages entitled to the benefits of the settlement, including "Noatak" and "Circle"). In Alaska claims that ANCSA did not recognize the tribal status of Native villages because it did not choose them "as recipients of the land and money benefits under the Act", Pet. Br. at 34, is groundless. Unless form overrides substance, the ANCSA benefits *did* go to the villages, albeit through village and regional corporations established by and for the villages. In addition, the state argues that to construe ANCSA to recognize all listed villages is over inclusive because it would include some villages with inactive councils or a minority of Natives. Pet.Br. at 35. The state cites

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Further, because ANCSA was based on the Federal Field Committee Report¹² which thoroughly documented the

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no evidence to show that some councils are inactive and the state demographic records show that the vast majority of ANCSA villages are overwhelming, indeed almost exclusively Native. See Alaska Federation of Natives, *The AFN Report on the Status of Alaska Natives: A Call For Action* 36 (1989); and also see, Alaska Department of Labor, Research and Analysis. Demographic Unit, *Selected Characteristics for Alaska Cities and Boroughs* (1985). But in any event these factors are irrelevant to the existence of tribal status. There are numerous reservations in the lower 48 with predominantly non-Native population. See e.g., the Flathead Reservation in Montana where Indians make up only 19% of the populations. *Moe v. Confederated Salish Kootenai Tribes*, 425 U.S. 463, 466 (1976). This factor has never been held to affect tribal status. Similarly the fact that a council has been inactive does not bear on tribal status. Tribes retain their tribal status and powers despite long periods of non-exercise. *United States v. John*, *supra*, at 652. As the leading treaties notes:

Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity. Once considered a political body by the United States [here, by virtue of the Treaty of Cession], a tribe retains its sovereignty until Congress acts to divest that sovereignty.

Cohen, *supra*, at 231; and see *Bottomly v. Passamaquoddy Tribe*, 599 F.2d at 1061, 1065 (1st Cir. 1979); and *Harjo v. Kleppe*, 420 F.Supp. 1110 (D.D.C. 1976) *aff'd sub nom.*, *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978); C. Wilkinson, *American Indians, Times, and the Law* 32-46 (1987).

¹² Congress had been presented with overwhelming evidence, of the tribal status of Native Villages in Alaska. Federal Field Committee for Development Planning in Alaska. Federal

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tribal nature of the Villages' aboriginal claims, it constituted an implicit Congressional finding that the listed villages were capable of asserting such claims, that is they were *tribes*.¹³ This is precisely what the court found below. *Noatak v. Hoffman*, 896 F.2d at 1160.¹⁴

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Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* (G.P.O. 1968). This report was prepared at the request of Senator Henry M. Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, and is recognized as a principal factual basis for much of ANCSA. The Report is a formal part of ANCSA's legislative history, S. Rep. No. 405, 92d Cong., 1st Sess. 73-74 (1971). See also Case, *supra* at 47, 129, 195, 205-207, 222-225, 236-245, 264-266; and the *Hearings before the Interior and Insular Affairs Committee on S. 35, S. 835 and S. 1571*, 92nd Cong., 1st Sess., at 514 (1971) (testimony of Governor Egan recognizing that "[s]ome kind of dominion by the Native people of Alaska has been exercised on occasion and from time to time over at least 60 million acres of Alaska").

¹³ The 3 to 2 Alaska Supreme Court decision in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988) which concluded to the contrary, that "there are not now and never have been tribes of Indians in Alaska as that term is used in Federal Indian law," *id.* 35, 36, is legally, historically and anthropologically wrong. It was primarily based on old territorial decisions of District Judge Matthew Deady which denied tribal existence, aboriginal title, and the existence of Indian country. See *United States v. Seveloff*, 27 F. Cas. 1021 (D. Ore. 1872); *Waters v. Campbell*, 29 F.Cas. 411 (D. Ore. 1876); *Kie v. United States*, 27 F. 351 (D. Ore. 1886); *In re Sah Quah*, 31 F. 327 (D. Alaska 1886). These cases were wrong when decided and in any event have been implicitly overruled. See *United States v. Pelican*, 232 U.S. 442, 447 (1914) (the fact that Congress amended the non-intercourse Act to make allotments Indian country for the purposes of federal liquor laws does

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not mean Congress intended to exclude them from that category for other purposes); and *In re Minook*, 2 Ak. Rpts. 200, 221 (D. Alaska 1904) ("the Indian tribes of Alaska [have] the same status before the law as those of the United States"); and *United States v. Berrigan*, 2 Ak. Rpts. 442 (3d Div. 1905); *Nagle v. United States*, 191 Fed. 141 (D. Alaska 1911) and *U.S. v. Cadzow*, 5 Ak. Rpts. 125 (D. Alaska 1914) to the same effect; See also *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955), *Tlingit and Haida Indians v. United States*, 389 F.2d 778, 782 (1968) and *People of South Naknek v. Bristol Bay Borough*, 466 F.Supp. 870, 877 n.12 (D. Alaska, 1979) (upholding Native aboriginal rights); and *In re McCord*, 151 F.Supp. 132 (D. Alaska 1957) and *Chilkat v. Johnson*, ___ F.Supp. ___, (D. Alaska), (No. J84-024 Civ., decided Oct. 9, 1990) Slip Op. at 15 (affirming the existence of Indian country). Moreover, Judge Deady's conclusions that there were no aboriginal rights, no Indian country and no tribes in Alaska were premised on the incredible ground that to hold to the contrary would be against "the true interests of a white population" and therefore impermissible. See Neidermeyer, *The True Interest Of A White Population: The Alaska Indian Country Decisions Of Judge Matthew P. Deady*, 21 New York University Journal of International Law and Politics, 195 (1988).

As the Ninth Circuit succinctly put it in *Native Village of Venetie v. State of Alaska*, ___ F.2d ___ decided Nov. 6, 1990, Slip Op. 13583 at 13603. "Judge Deady's superannuated views of tribal sovereignty notwithstanding, such notions are not the law today." See also the Amicus Brief of the United States in *Puckett v. Tyonek*, No. 89-609, 8-12; and Smith and Kancewick, *The Tribal Status of Alaska Natives*, 61 U. of Col. L. Rev. (1990) demonstrating the tribal status of Alaska Native Villages historically and anthropologically as well as under principles of Federal Indian law.

¹⁴ With respect to Native groups not previously recognized by the political branches, the basic criteria for determining tribal status was established by this Court's definition of "tribe" in *United State v. Montoya*, 180 U.S. 261, 266 (1901):

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While it is true that in ANCSA Congress extinguished "[a]ll aboriginal titles, if any"¹⁵, this does not mean that Congress doubted the existence of any such title in Alaska. Congress was well aware that Alaska villages held aboriginal title. The Federal Field Committee report had thoroughly documented their tribal status as well as their aboriginal claims in every area of the state. And Congress "recognize[d] . . . that the Natives *do* have valid claims to some lands, undetermined in quantity and in value."¹⁶ (emphasis added). The problem was

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By a "tribe" we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . .

This definition was later relied on to define "any tribe of Indians" in the Indian Non-Intercourse Act. *United States v. Candelaria*, 271 U.S. 432, 443 (1926). Subsequently, it has become the accepted judicial definition of "tribe" for the purpose of determining tribal status. *Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377-78 (1975); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir. 1979); *Noatak v. Hoffman*, 896 F.2d 1157, 1160 (9th Cir. 1990); *Smith and Kancewick*, *supra*, 47. It also formed the basis for the recognition criteria used by the executive branch in the department of Interior's Federal Acknowledgement (FAP) regulations. 25 C.F.R. Section 83.7(b) and (c).

¹⁵ 43 U.S.C. 1603(b) (emphasis added).

¹⁶ H.R. Rep. No. 523, *supra* note 284, reprinted in 1971 U.S. Code Cong. & Admin. News at 2194-95 (emphasis added). Accord S.Rep. No. 405, *supra* note 319, at 76-77.

The extent to which the Natives in Alaska could prove their claims of aboriginal title is not known. . . . If the tests developed in the courts with respect to Indian Tribes were applied in Alaska, the probability is that the acreage would be large - but how large no one knows . . .

Congress did not know precisely which lands could be claimed, how much could be claimed or its value. Because of these uncertainties, and the time required to resolve them, Congress decided "a legislative rather than a judicial settlement [was] the only practical course to follow." H.R. Rep. No. 523, *supra* note 284, reprinted in 1971 U.S. Code Cong. & Admin. News at 2194. Accord S. Rep. No. 405, *supra* note 319, at 77-78. The phrase "if any" therefore reflected Congress' desire to avoid passing on the validity of claims to particular parcels, rather than doubt as to the existence of any aboriginal title or as to the Villages' capability of possessing such title.¹⁷

This is not to suggest that quality of the land claims brought by Circle, Noatak, and other Alaska Native tribes is determinative of the tribal status of such claimants. Rather, as noted in the *Delaware Tribal Business Committee* case, the relevant fact is that Congress elected to treat the settlement of the claims as tribal aboriginal claims to land. In treating such claims as aboriginal claims, Congress *a fortiori* recognized the claimants as tribes.

An alternative characterization of the claims would lead to the conclusion that the ANCSA was violative of the Constitutional power of Congress. While the ANCSA was a generous settlement of aboriginal claims, it did not

¹⁷ Indeed, Congress confirmed the existence of such title when it amended ANCSA in 1987, by nothing that "[t]he Native rights to lands in Alaska *had been recognized and preserved* in the treaty with Russia acquiring Alaska; the Territorial Enabling Act; and the Alaska Statehood Act." (emphasis added) H.R. Rep. No. 31, 100th Cong., 1st Sess. 2 (1987); See, *Smith and Kancewick*, *supra*, at 513, M. 352.

seek to compensate Alaska Natives for the full and true value of their interests in lands. Rather, the 44 million acres of land and slightly less than one billion dollars received by Alaska Natives is an arbitrary figure unrelated to a valuation of land interest surrendered by Alaska Natives.¹⁸ The significant difference between aboriginal title and any other form of interest in land, including other forms of tribal land ownership, is that aboriginal title may be extinguished by the United States without creating a constitutional right to adequate compensation. *Tee-Hit-Ton Indians v. United States*, *supra*. This unique ability of Congress to settle aboriginal claims outside the Constitutional protections against the uncompensated taking of property, flows from the unique status of Indian tribes and the nature of their title. *id.* See also *Johnson v. M'Intosh*, 21 U.S. (5 Wheat.) 543 (1823). As this Court in *Tee-Hit-Ton* noted, Alaskan Native claims were aboriginal in nature. In setting those claim, Congress so treated them. To now characterize the claims as some other type of claim, seriously calls into question the constitutionality of ANCSA as well as the adequacy of compensation provided under that Act.¹⁹

The state however, argues that ANCSA cannot be construed to recognize the tribal status of the listed villages because it defines "Native villages" as any "tribe,

¹⁸ 17 See fn. 15.

¹⁹ If *Tee-Hit-Ton* was incorrect, an alternative basis to claim title by Alaska Natives probably may be found under the Treaty of Cession, which protected the interests in property of the inhabitants of Alaska at the time of transfer from Russian to the United States. See 15 Stat. 539.

band, clan, group, village community, or association," which would "include Native groups that could not claim tribal status." State's brief at 35. The argument assumes an erroneous statement of the law. As noted above, Congress had often used such broad language to refer to Indian tribes simply because the political organization of the various Native American tribes found in the United States is very diverse. For example, in *Montoya v. United States*, *supra*, the Court found that a rather large band of Indians comprised of a minority of three various tribes of Apache Indians (i.e. the Chiricahua, Mescalero, and Southern Apache) who had banded together to engage in war with the United States was a distinct tribe independent of the main bodies of such tribes of which the members were part. The Court noted that the words "nation," "tribe," and "band" have been used by Congress interchangeably. *id.*, at 265. The lexicon of tribal denomination has grown considerably since 1900 to include the variations contained in ANCSA.²⁰

5) Congress has recognized the tribal status of Alaska Native villages through other laws since ANCSA.

Every major piece of Indian legislation designed to further tribal self-government since ANCSA *expressly*

²⁰ Numerous tribes in the lower 48, which are unquestionably federally recognized, are not called tribes at all. See e.g., the Onadoga Nation of New York; the Rincon Band of Mission Indians of California; the Table Bluff Rancheria of Wiyot Indians of California; the Reno-Sparks Indian Colony; the Ford McDowell Mohave Apache Indian Community of Arizona; and the Pueblo of Laguna. See, BIA list of federally recognized tribes for the lower 48, 53 Fed. Reg. 52829, Dec. 29, 1988.

defines Alaska Native Villages as tribes.²¹ The significance of these actions is two fold, in that they evince a course of dealing with Circle, Noatak and other ANCSA recognized tribes consistent with federal recognition, and confirm that such a policy is consistent and furthers the Congressional intent in ANCSA itself.

As noted above, where Congress has engaged in a course of dealing with a Native group in a manner consistent with tribal status, Congress extends recognition of tribal status. *United States v. John, supra*. The legislative enactments demonstrate a consistent policy of Congress since ANCSA, to deal with the ANCSA villages as it does with other recognized tribes. Moreover, since most of these Acts specifically reference ANCSA, these Congressional actions would be *pari matri* with ANCSA: evincing an intention that ANCSA was in itself recognition of this ongoing government to government relationship.

The state argues that these acts recognize tribal status solely for the purpose of the particular Act. The Ninth Circuit acknowledged this possibility but rejected it on the ground that:

²¹ See e.g., the following Acts all define the tribes to include the villages listed in ANCSA, 43 U.S.C. Section 1610. Indian Financing Act of 1974, 25 U.S.C. 1452(c); Indian Self-Determination and Education Act of 1975, 25 U.S.C. Section 450-450m, (See particularly 25 U.S.C. Section 450(b)); Indian Tribal Government Tax Status Act, 26 U.S.C. Section 7701(a)(40); Indian Health Care Improvement Act of 1976, 25 U.S.C. Section 1903(8); Clean Water Act, 33 U.S.C. Section 1377(g); Resource Conservation and Recovery Act, 42 U.S.C. Section 6903(13)(A); State and Local Fiscal Assistance Act, P.L. 92-512, Sec. 108(b)(14).

the nature and scope of the federal government's relationship with the Native villages, as evidenced by these Acts, indicates that the recognition extends to legal claims.

Id.

The simple fact is that these enactments are too numerous and so parallel the unfolding Congressional policy toward all Indian tribes in this country as to deny a mere casual or incidental connection with Federal Indian Policy. Rather the sheer weight of the volume of the enactments reflect a conscious Congressional intent to incorporate Circle, Noatak and the other ANCSA tribes into the mainstream of Federal Indian Policy, save the character of Alaskan Native land tenure.

Pursuant to the Snyder Act 25 U.S.C. Section 13, Congress annually appropriates nearly \$200 million for the benefit of Alaska Native people. In FY 1988 another \$165 million was appropriated for Native Health programs in Alaska and significant additional funds were appropriated for Native Housing programs. Under the Indian Self-Determination Act Congress has appropriated millions of dollars in Federal grants to Native Villages in Alaska for the express purpose of "strengthening or improvement of tribal governments." (emphasis added) 25 U.S.C. Section 450h(a)(1). In 1984 there were 155 such grants in Alaska ranging between \$6,000 and \$15,000 each. Case, *supra* at 416. Under the Indian Financing Act, tribes, including Alaska Villages, are defined as "states" and thus as governments entitled to the benefits of the Act. 25 U.S.C. Section 1452(c), 31 U.S.C. Section 7102.

The state sees no intent to recognize Alaska Villages in the Self-Determination Act, 25 U.S.C. 250b(e) because it

also designated ANCSA corporations as "tribes" when in the political sense they unquestionably are not. The argument ignores the terms of the ANCSA which provide that the village corporations were organized "*for and on behalf of a Native Village*," 43 U.S.C. Section 1611(a)(1). (emphasis added) In other words, the corporations were organized for and on behalf of the tribes. The fact that Congress granted a benefit to tribes does not diminish the status of the tribe under federal law so much as it reflects an ongoing intent to provide benefits to Alaskan Natives on account of their status as Indians.²²

²² Congress explicitly defined tribes as: "Any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village * * * recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. Section 450b(b). The source of these programs is the government-to-government contracting which is authorized under the Act. The ending clause modifies the entire first clause but only that clause. The Ninth Circuit so construed this section in *Cook Inlet Native Ass'n. v. Bowen*, 810 F.2d 1471. The excluded reference to regional or village corporations established pursuant to ANCSA reflects that those entities were hastily added late in the legislative process and the modifying language at the end of the definition was not intended to apply to such corporate entities. *Id.* Congress included the corporations only so there would be a mechanism for contracting programs in communities where there was no "recognized" tribe (i.e., Anchorage and Fairbanks, where programs are contracted under the auspices of ANCSA regional corporations). This, of course, did not make the governmental purposes. *Cape Fox Corporation v. United States*, 456 F.Supp. 784, 798 (D. Alaska 1978).

B. The Secretary Of The Interior Has Recognized Circle And Noatak.

Alaska argues that the Secretary has not recognized Circle or Noatak in the administrative list of federally recognized tribes. Petitioner's Brief at 28. This is not the case. As noted by the Petitioners, the Secretary annually publishes a list of tribes recognized by the Secretary as tribes entitled to the "immunities available to other federally acknowledged tribes by virtue of their status as Indian tribes . . . " 25 C.F.R. Part 83.2. The villages of Circle and Noatak both appear on that list. See 53 Fed. Reg. 52832-52835.

Alaska argues that since the list includes many organizations, including ANCSA corporations, which are not governmental bodies, that the list is meaningless. The argument is disingenuous. The list is clearly published under 25 C.F.R. Part 83.2, which only relates to tribal recognition. Moreover, prior lists published by the Department of the Interior did not contain the ANCSA corporations. Cf. 51 Fed. Reg. 25115 (July 10, 1986). As the 1989 preamble explains, the ANCSA corporations were added because they are eligible to contract on behalf of villages under the Indian Self-Determination Act and are eligible for some services on account of their status as "Indian". The ANCSA corporations are clearly distinguishable from the village governmental entities. Moreover, as noted above, the ANCSA corporations were organized "for and on behalf" of the tribes, and merely because Congress creates corporations for the benefit of a

tribe does not diminish the tribe's status.²³ *Supra*. Finally, as noted below, the Secretary's power to terminate tribal power once a tribe is recognized must be authorized specifically by Congress. See COHEN, *supra*, at 813-814. The Commissioner's argument suggests that the Secretary may do by implication that which he cannot do directly, which is to say that the confusion raised by Alaska regarding the 1989 list somehow abrogates the effect of the 1986 list. Abrogation of tribal status and or rights is reserved to Congress, and such abrogation must be explicit. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

The fact that the list includes ANCSA corporations does not deny the basic function of the list, and recent pronouncements of the BIA on tribal status of entities not the subject of this litigation, does not deny the effect of prior actions of the Secretary which unambiguously recognize the tribes.

Other administrative agencies of the federal government have similarly recognized the tribal status of the villages. The Administration for Native Americans (ANA) within the Department of Health and Human

²³ It should be noted that Sec. 17 of the Indian Reorganization Act also authorized the creation of corporations for the benefit of tribes. See 25 U.S.C. Section 477. The major distinctions are that under the IRA, the corporations were incorporated under federal law as opposed to the ANCSA which organized the corporations under state law, and that there was greater latitude in the internal structure of the IRA corporations than exists under ANCSA. Recently, Congress has authorized greater flexibility for ANCSA corporate structure than was previously permitted. P.L. 100-241.

Services has recognized the tribal status of Native Villages listed in ANCSA by awarding them numerous grants for tribal self-determination, including the formation of "tribal courts." 51 Fed. Reg. 36517 (Oct. 10, 1986). In its program announcement, ANA notes that "[i]n the development toward self-sufficiency, ANA places the highest emphasis on increasing the effectiveness of the governing capabilities of Indian tribes, Alaska Native Villages, and Native American groups." 51 Fed. Reg. 36518 (Oct. 10, 1986) (emphasis added). See also, *ANA Availability of Financial Assistance*, 53 Fed. Reg. 28442, 28443-28444 (July 28, 1988).

The Internal Revenue Services has determined that "Alaska Native Villages", including Noatak and Circle, are eligible for revenue sharing benefits because they "carry out substantial governmental duties and powers." (emphasis added) 31 U.S.C. Section 6701(a)(5)(B) (repealed April 7, 1986, P.L. 99-272, Title XIV, Section 14001(a)(1), 100 Stat. 327). The Secretary of the Treasury, after consultation with the Secretary of the Interior has also determined that Alaska Native Villages, including Noatak and Circle, have "governing bodies" which "exercise governmental functions" within the meaning of the Indian Tribal Governmental Tax Status Act. See 26 U.S.C. Section 7701(a)(40)(A); 26 C.F.R. Section 305.7701-1; Rev. Proc. 83-87 (listing "Alaska Native Entities" recognized to exercise governmental functions.)²⁴

²⁴ Although the Tax Status Act disclaims any intent to validate or invalidate claims of sovereign authority over lands or people, it does *not* disclaim recognition of the tribal status of the listed villages.

In short, the Executive Branch, acting through the Departments of the *Interior, Treasury, Health and Human Services, Housing and Urban Affairs* and through the *IRS* and *EEOC* have all expressly recognized that Alaska Native Villages including Noatak and Circle, are "tribes."

C. Circle Would Be Recognized As A Tribe Using The Test Articulated By The Petitioner Applicable To Unrecognized Tribes.

The Commissioner argues that Circle must demonstrate in Court that it is a tribe using the criteria enunciated in the Federal Acknowledgment Process, (FAP) 25 C.F.R. Part 83, and cites as authority for such proposition, *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir. 1979), and *Native Village of Venetie v. State of Alaska*, ___ F.2d ___, No. 88-3929 (9th Cir. Nov. 6, 1990). Petitioner's Brief at 28. The authority is misplaced.

The first two cases dealt with groups which have never been recognized by Congress or Executive action. In the face of Congressional and Executive silence providing for the treatment of the claimants as Indian tribes, the Courts looked to the criteria contained in the FAP regulations. The obvious distinction is that both the Congress and the Executive have a long history of dealing with Alaska Native Tribes. In the Venetie case, the Court expresses uncertainty respecting the tribal government structure and enunciated a test that the claimant regime demonstrate an historical nexus between it and the historical tribe from which it claimed descent. In this case,

there is no ambiguity surrounding the tribal governing regime.

Nonetheless, Circle can easily demonstrate that it is a tribe under the test articulated in the FAP regulations from materials readily available to this Court. The Commissioner puts forward an inaccurate generalized "history" of tribal organization in Alaska to suggest that Alaska "tribes" were composed of miscellaneous, unassociated Indians bound together by an accident of geography. While this is unlikely with regards to any Alaskan Villages, it is patently erroneous with regard to Circle.

The Interior of Alaska has been populated by Athabascan²⁵ Indians since prior to the coming of the Russians in 1843.²⁶ The Indians of the Interior were the last to come into contact with white men.²⁷

Athabascan is a linguistic family which includes Indians from Alaska, across Canada and extending down to the Mexico border.²⁸ Prior to the coming of the

²⁵ Also Athapaskan, Athapaskan, Athabaskan.

²⁶ Clarence C. Hulley, *Alaska: Past and Present*, 1958 at p. 27.

²⁷ Ibid.

²⁸ See John R. Swanton, *Indian Tribes of Alaska and Canada*, A Reprint of a Portion of "The Indian Tribes of North America" first published in Washington, D.C., 1952, Facsimile Reproduction 1971. See also *Alaska: Past and Present*, Ibid. pp. 27-28; Don Charles Foote and Sheila K. MacBain, *A Selected Regional Bibliography for Human Geographical Studies of the Native Populations in Central Alaska*, Geography Department Publication no. 12, 1964; *Compilation of Narratives of Explorations in Alaska*, Washington Government Printing Office, 1900, Report of Ivan Petrof on the Population Resources, Etc. of Alaska, From the United States Census Report of 1880, pp. 257-258.

Russians, British, and Americans, the Gwich'in²⁹, the Athabascan Indians of the Upper Yukon River in Alaskan Interior were semi-nomadic, residing along the drainage of the Yukon River. They moved from place to place within their territory in a constant food quest.³⁰ They lived a subsistence lifestyle, which required a particular permanent hunting grounds usually extending for several hundred square miles. The Interior of Alaska did not support a large population. A tribe needed its entire hunting ground to support itself, the territory was jealously guarded. For the most part these people lived in the Interior of Alaska along large rivers and their tributaries.³¹

The governmental organization of these semi-nomadic Indian tribes was not a complicated one. Each tribe was headed by some man, who by common consent, was recognized as chief, but had only such authority as the individuals were willing to grant him. Community affairs were settled by a general council in which the

²⁹ Also Kutchin, Kwitchin, Kuchin, Gwitch'in, Gwitchin, Dene, Tinneh and other name spellings depending on author and source.

³⁰ *Alaska: Past and Present*, Ibid. at p. 27; *Indian Tribes of Alaska*, Ibid. at pp. 529, 533-540, 543-544; *Compilation of Narratives of Explorations in Alaska*, Ibid. pp. 257-263, Report of a Military Reconnaissance Made in Alaska in 1883, Lieut. Frederick Schwatka, pp. 338-352. Report of a Military Reconnaissance in Alaska, made in 1885 by Lieut. Henry T. Allen, Second United States Cavalry, pp. 476-482.

³¹ *Alaska: Past and Present*, Ibid.; *Indian Tribes of Alaska*, Ibid.; *Compilation of Narratives of Explorations in Alaska*, Ibid.

chief and the older men decided matters by rule of custom.³² Tribes were often distant from one another geographically. Upon occasion, a paramount chief was recognized by a number of tribes as a leader with several sub-chiefs, but this was rare.³³

The Gwich'in were first brought into contact with Europeans when Alexander Mackenzie met some of them in 1789 during his descent of the river which bears his name. This acquaintance became more familiar with the establishment of the first Fort Good Hope in 1847. Until Alaska passed into the hands of the United States, practically all of the relations which the Gwich'in Tribes had with Europeans was through the Hudson Bay Company.³⁴ Since then influences from the west have been more potent. Missionaries followed close upon the heels of the traders³⁵. Then came the discovery of gold in the Klondike region and the rush of miners which followed.³⁶

When the non-Native entered the interior of Alaska, he came to trade and later to exploit the natural resources

³² *Alaska: Past and Present*, Ibid. at p. 28; Robert J. Peratrovich, Jr., *State of Alaska Department of Education Source Book on Alaska*, Revised Edition, 1971, pp. 26-27.

³³ *Compilation of Narratives of Explorations in Alaska*, Schwatka, Ibid. p. 315.

³⁴ Although admittedly they may have had some minor contact with the Russian American Company and with the Russian Imperial Navy. See *Compilation of Narratives of Explorations in Alaska*, Ibid. p. 417.

³⁵ William E. Simeone, *A Catalog of Photographs from the Archives and Historical Collections of the Episcopal Church*. For the Alaska Historical Commission, 1981, Appendix.

³⁶ *Indian Tribes of Alaska*, Ibid. at 536-537.

of the indigenous peoples' territories. At first, the traders located their trading posts in or near Natives' semi-permanent settlements or ceremonial meeting places. Later, the trading posts were placed at a distance from the Native Villages as the clash of cultural expectations between the Indians and the traders made the traders uncomfortable in close proximity to the Indians.³⁷ Shortly after the arrival of the explorer and trader, came the church.³⁸ The miner followed close on their heels to pursue his dreams of gold.³⁹ For the most part, the explorer

³⁷ Evidence of the discomfort of the traders is described obliquely in *Compilation of Narratives of Explorations in Alaska*, Schwatka, Ibid. p. 341. "About a mile below [the village] are several well-built log houses formerly occupied by traders, but have since been abandoned as unprofitable, it being considered wiser, if possible, to make the Indians come to a store rather than locate it in their midst, on account of the inherent tendency among them to covet everything they see."

"This, as well as the other tribes of this section, have peculiar ideas of right and honor, for while apparently never hesitating for an instant about making away with anything which happens to please them, provided it be not stored away, yet if 'cached,' as it is called, away from the owner, they will not touch it, and are said to regard this with such respect as to almost starve before helping themselves to any food so cached." Ibid. at 343.

It is a fact, although not as well described, that the Natives were equally disturbed by the non-Native's culture and culturally based expectations. In fact, it is the clash of cultures, that was likely responsible for the killings of traders at the Russian trading station in Nulato in 1851. *Compilation of Narratives of Explorations in Alaska*, Raymond, Ibid. pp. 36-37.

³⁸ *A Catalog of Photographs*, Ibid.

³⁹ *Alaska: Past and Present*, Ibid. at pp. 222-229.

and miner were transients, (although some stayed on and their descendants remain to this day,) leaving for new discoveries, new "strikes" and new territories. There remained the trader, the church and the tribes.

The history of the Native Village of Circle Tribe and the geographic community of Circle are a strong example of this history pattern. Charley's Village⁴⁰ was a Tudush⁴¹ Tribe and was and is Gwich'in. There is dispute among the various authorities as to whether Charley's Village was Han Gwich'in, Kutcha-Gwich'in, or Tennuth-Gwich'in⁴². For the purposes of this argument, which Gwich'in they are is not important. What is important is that the tribe had a semi-permanent settlement along the Yukon upriver of Fort Yukon in 1883.⁴³ The tribe was ruled by a Chief known as Charley.⁴⁴ Although the former geographic location of this semi-permanent settlement is uncertain, it is believed that Charley's Village was approximately 48 miles from the present geographic location of Circle.⁴⁵ The tribe was known as a genial people friendly to the white traders and explorers.⁴⁶

⁴⁰ In some sources "Charlie's Village".

⁴¹ Or Tadoosh.

⁴² Or Han Kutchin, Kutcha-Kutchin, or Tennuth-Kutchin.

⁴³ *Compilation of Narratives of Explorations in Alaska*, Schwatka, Ibid. pp. 312-313, 316, 343.

⁴⁴ Ibid. at 343.

⁴⁵ Ibid. at 316 and maps; Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land*, 1968 Map of Native Communities of Alaska.

⁴⁶ *Compilation of Narratives of Explorations in Alaska*, Schwatka, Ibid. pp. 312-313, 343.

In 1887, L.N. McQuesten located a trading post at the present geographic location of Circle. After the strike in 1893, when gold was discovered in Birch Creek, the former trading post became a booming mining supply town.⁴⁷

In 1896, the population was estimated by the Episcopal Church to be great enough to establish a church there. When Bishop P. T. Rowe visited there in that year, he found Alaska Indians who were already converted to Anglicism.⁴⁸ But by 1910, with the ending of the gold rush, the population of Circle had shrunk to 144.⁴⁹ It was increased in 1914 when the remaining members of the Charley Village Tribe⁵⁰ moved to the Circle geographic location because the settlement at the original Charley's Village location was destroyed by the ice breakup on the Yukon that year.⁵¹ As acknowledged by Petitioners, the majority of the population of Circle is Native. Most of the non-Native majority population of Circle left and did not

⁴⁷ *Alaska: Past and Present*, Ibid. at p. 228, *Alaska Natives and the Land*, Ibid. at p. 209 and Donald J. Orth, *Dictionary of Alaska Place Names*, Geological Survey Professional Paper 567, U.S. Government Printing Office, 1967 p. 219.

⁴⁸ *A Catalog of Photographs*, Ibid. Records of the Episcopal Church indicate that the Indians in Circle at this time came from Tanana, Porcupine and Charley Tribes.

⁴⁹ *Dictionary of Alaska Place Names*, Ibid.

⁵⁰ The population of the Charley's Village Tribe in 1883 was 40 to 50 people. *Compilation of Narratives of Explorations in Alaska*, Schwatka, Ibid. p. 343.

⁵¹ *Alaska Natives and the Land*, Ibid. at p. 206. This move alone demonstrates the tribal nature of the Charlie's Village people in that they moved to Circle as an intact unit.

return. The Native population remained and is there to this day as the majority.

The Native Village of Circle Tribe, which is the historic Charley's Village Tribe, can trace it's member families back to those Indians in Circle in 1914. The Native Village of Circle still has a traditional form of government, a Chief and traditional council.⁵² The Chief continues to have only as much authority as the members of the tribe grant him. The Chief and the Council continue to rule by rule of custom. The tribe is distinct from other Athabascan Tribes and yet has much in common with them. Its government has maintained its integrity since its establishment, although, like all governments it has been sometimes stronger than other times.

Oddly enough, Alaska has dealt with the Circle Village Council in a government-to-government relationship. For example, the Alaska Department of Community and Regional Affairs has concluded an agreement with the village council to co-manage the lands set aside for community expansion under Sec. 14(c) of ANCSA. That agreement expressly acknowledges the government-to-government character of the arrangement.⁵³ Additionally, the Alaska Department of Health and Social Services has recently concluded another "government-to-government" agreement with the village council under Sec. 109 of the Indian Child Welfare Act.⁵⁴ These agreements expressly

⁵² *Alaska Natives and the Land*, Ibid. at p. 47; Case. *Alaska Natives and American Laws*, pp. 341-343 (1984).

⁵³ See Supplemental filing by Circle.

⁵⁴ *Id.*

recognize that the village council is a governing body of some importance in the community, sufficient for Alaska to consider it a "government". The agreements also reflect the fact that the state considers the Council significant enough to its governance of the village to pursue cooperative arrangements. It is indeed curious that while Alaska claims that they are not a tribe, the state engages in relations with the village which are peculiar to tribal status.

Under even the test the State of Alaska proposes, the Native Village of Circle is a tribe, entitled to tribal status and the benefits of tribal status.

II. THE ELEVENTH AMENDMENT IS NOT A BAR TO THE TRIBES' SUIT.

The Petitioner Alaska and Amici contend that the Court of Appeals erred in holding that the Eleventh Amendment is not a bar to suit by tribes suing under 28 U.S.C. 1362. This statute provides that the federal district courts shall have jurisdiction to hear suits brought by Indian tribes.

Alaska and Amici generally contend that the states possess sovereign immunity from such suits. They acknowledge that such immunity from suit does not apply in two cases: a suit by the Federal Government or a Sister State against a state,⁵⁵ or where Congress has

⁵⁵ Generally citing, *United States v. Texas*, 143 U.S. 621, 645 (1892); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

abrogated a state's immunity by statute where such abrogation is explicit and textual.⁵⁶ The Circuit Court noted that 28 U.S.C. 1362 does not contain an explicit and textual abrogation of state sovereign immunity. Consequently, the states argue that the Circuit Court's analysis is flawed.

Alaska's argument rests upon the unstated assumption that the Circuit Court's analysis is intended to fall within the latter of these two exceptions to state sovereign immunity. This is incorrect. Rather the reason a tribe may sue a state under U.S.C. 1362 without consideration of the state's Eleventh Amendment protections is found in the first exception noted above.

Phrased another way, the reason an explicit and textual abrogation is not required in the statute is that no abrogation of states' rights has been made. Rather 28 U.S.C. 1362 is a delegation of federal rights, not an abrogation of states' rights.

A. Congress Has Delegated To The Tribes Its Authority To Sue The States.

It has long been admitted that Congress may delegate to the tribes certain authority which it may possess over Indian affairs. *United States v. Mazurie*, 419 U.S. 544 (1975) (Congress may delegate to tribes the authority to regulate alcohol within Indian Country). *See also*, Indian Self-Determination and Education Act 25 U.S.C. Section

⁵⁶ Generally citing, *Dellmuth v. Muth*, ___ U.S. ___, 105 L. Ed. 2d 181 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

450 et seq. (authorizes the delegation by contract to tribes the authority to operate Indian programs).

The statute in question, 28 U.S.C. 1362, delegates to tribes the authority to bring causes of action before the district courts without regard to the other jurisdictional requirements of federal law.

The legislative history⁵⁷ of the statute clearly indicates that it was intended to delegate to the tribes the authority to bring suit in federal court to the same extent that the federal government could bring suit on behalf of the tribes. Two justifications were offered for the statute. First, Congress wished to remove jurisdictional bars to the federal forum for tribes: most notably the requirement of a \$10,000 jurisdiction amount. H.R. Rep. No. 2040, 89th Cong., 2d Sess., (1966) reprinted at 1966 U.S. Code Cong. Section Admin. News 3146. Second, the statute would allow tribes to bring suit to protect their interests where the U.S. Attorney declined to bring an action. *Id.*, at 3147. These purposes, taken together, are a delegation to the tribes of the federal authority to represent the Indian tribes in litigation, in federal court

⁵⁷ It is anticipated that the states will object to a review of the legislative history in light of this Court's statements in *Dellmuth* which rejects the use of legislative history to determine whether an abrogation of a state's Eleventh Amendment's rights has been made. The reference to legislative history employed here is not to show that an abrogation of state's rights occurred. Rather, the legislative history is offered for an altogether different purpose, i.e., to demonstrate that an abrogation did not take place and that a delegation of federal power was contemplated by Congress.

notwithstanding jurisdictional bars to such representation not occasioned by federal representation.

It must be noted that the doctrine of sovereign immunity is a jurisdictional bar in the federal courts. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). It is not a bar, however, to the federal government. Congress expressly wished to delegate to the tribes its unique access to federal courts notwithstanding jurisdictional bars which otherwise limit tribes' ability to protect their interests in the federal courts.

This Court has held that a tribe suing under this statute stands in the shoes of the federal government; clothed in the privileges of the federal government. *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976). Consequently, a tribe is not barred by the Anti-Injunction Act [28 U.S.C. Section 1341], merely because the federal government would not be so barred. In delegating the federal power to access federal courts irrespective of jurisdictional bars, the statute makes no exception to preserve jurisdictional bars not incumbent on the federal government. It therefore follows, that since the federal government would not be barred by the Eleventh Amendment, neither would the tribes.

An abrogation of states' rights under the Eleventh Amendment is not a relevant concern, since the state has no right to bar the federal government who may bring suit to protect tribal interest. Since no right of the state is abrogated, a textual analysis of the statute is irrelevant.

B. 28 U.S.C. 1362 Reflects A Tension Between The Commerce Clause And The Eleventh Amendment, Which When Balanced Against Each Other, Tip In Favor Of The Tribes.

The statute in question is a Congressional enactment authorized under the Indian Commerce Clause. As noted above, this power over Indian affairs is said to be "plenary". *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977). Plenary, however, does not mean absolute, and Congressional legislation respecting Indians will be upheld "so long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward Indians." *Id.*, at 85.⁵⁸ In this case, Congress has delegated to Indian tribes the authority to access the federal courts as would the federal government. The states seek to graft over the statute a major exception severely limiting the rights of the tribes established by federal statute. The states offer no authority to support the contention that Congress intended such a result. Such a construction would be contrary to the general notions of statutory construction which hold that ambiguities in statutory language are to be resolved in favor of the Indians. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

Necessarily, the exercise of this power conflicts with the Eleventh Amendment when the tribes seek to exercise

⁵⁸ There is no suggestion in any of the briefing so far that Congress has exceeded its authority under the Indian Commerce Clause. As noted, the statute is intended to assist tribes in the protection of their litigable interests. Such a statute is obviously tied to Congress' unique obligation toward Indians. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

this right relative to a state. When tension is occasioned by the conflict between two provisions of the constitution, a balance must be struck to do equity to the relative Constitutional rights involved. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

As most ably argued in the amici brief of the Council of State Governments, the states surrendered a portion of their historic sovereignty upon admission to the Union. Part of that surrender involved a surrender of such immunity as necessary to permit suits by and among the states and federal government to resolve controversies in a manner consistent with the essential need for the peace of the Union. *Id.* at 11.

Similarly, upon association with the Union, Indian tribes either surrendered or involuntarily lost a portion of their historic sovereignty. *Johnson v. M'Intosh*, 21 U.S. (5 Wheat.) 543 (1823). Unlike the states, however, the tribes entered the Union upon decidedly unequal terms. Their status was less than that accorded the states. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Of particular relevance to this case was the inability to bring an original suit in the Supreme Court. As the Court in *Cherokee Nation* stated, their appeal for redress was either "to the tomahawk, or the government." *Id.*, at 16. In this day and age the suggestion that Indian tribes must resort to war to seek redress of their complaints is simply bad policy and contrary to the peace of the Union. It therefore follows that Indians should have redress of their political rights in disinterested forums for the same reasons that the state have such access.

Of course, the purpose of the Eleventh Amendment was to limit, as much as practicable, suits against the states to the Courts of those states. This purpose, however, is directly at odds with the Constitutional scheme to vest power over Indian affairs in the hands of the federal government. The practicality of this argument was noted by this Court in *United States v. Kagama*, 118 U.S. 375 (1886), wherein the Court stated:

Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

The policy of the Eleventh Amendment, which might otherwise force tribes into hostile state forums, is clearly at odds with the Commerce Clause's reservation of Indian affairs to the province of the Federal government. Such hostility can best be illustrated in the preceding case brought by Circle in the state courts. In that case, the Court held that there was no available remedy for the tribes for a violation of state statutory law. *Circle Village Council v. State of Alaska*, No. 343 [May 13, 1987, Ak.Sup.Ct.] (Memorandum Opinion).⁵⁹

⁵⁹ J. Robinowitz dissented noting that relief would be available under A.S. 09.50.270.

C. Tribal Sovereign Immunity Differs From State Sovereign Immunity And Must Be Maintained.

Of course, the argument that states should not be immune from suits by Indian tribes begs the question as to tribal sovereign immunity. The policy considerations of the concepts differ to such a degree as to suggest a different treatment.

Because of its status as a sovereign entity, an Indian tribe is generally immune from suits to which it does not consent. *Chemehuevi Indian Tribe v. California Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985).⁶⁰ This immunity is coextensive with that of the United States. *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983); *California ex rel. California Department of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). As stated by the Ninth Circuit in *Chemehuevi*, this immunity is rooted in the unique relationship between the United States Government and the Indian tribes, whose sovereignty substantially predates the Constitution.⁶¹ There are different reasons for tribal immunity from suit than there are for any immunity from suit enjoyed by the states. The tribes' immunity from suit is of the utmost necessity to preserve the autonomous

⁶⁰ Citing, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

⁶¹ Citing, *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981).

political structure of the tribes and to preserve tribal assets⁶².

State immunity from suit is based upon "the sensitive problems inherent in making one sovereign appear against its will in the courts of another". *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279 at 294 (1973); quoted in *Welch v. Dept. of Highways & Public C*, 483 U.S. 468, 486 (1987). *Welch* also found that the extent and boundaries of state sovereign immunity from suit are determined by the structure and requirements of the federal system. The Court in *Welch* noted that the United States may sue a state, because that is inherent in the Constitutional plan⁶³. States may sue other states because a federal forum for suits between states is "essential to the peace of the Union." *Welch*, supra at 483. In general, then, states may be sued by other domestic sovereigns because of the basis and boundaries of the need for states' immunity from suit.

Indian tribes, who are domestic sovereigns and who must protect the integrity of their sovereign status, including their right to self-government and their meager resources require more protection from suit, even from the states themselves if they are to survive. Few if any

⁶² Oregon, Id.; *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, 521-22 (5th Cir.) cert. denied, 385 U.S. 918 (1966); *Adams v. Murphy*, 165 F. 304, 308-09 (8th Cir. 1908). See Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982) demonstrating that the federal policies of tribal self-determination, economic development, and cultural autonomy require tribal immunity from suit.

⁶³ Citing, *Monaco v. Mississippi*, 292 U.S. 313 (1934).

states are found in such condition as to give equal concern for their very perpetuation.

Considering the unequal power of the states and the tribes, and the historical role of the federal government as an arbiter of relations between the tribes and state, the relative balance of equities suggest that the Eleventh Amendment must yield to the operation of the Commerce Clause.

CONCLUSION

Circle Village respectfully requests the Court to affirm the Circuit Court's opinion.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1990

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

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No. 89-1782

In The
Supreme Court of the United States
October Term, 1990

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

**I. THE SOVEREIGN IMMUNITY OF STATES AND
THE ELEVENTH AMENDMENT BAR THIS LAW-
SUIT.**

The sovereign immunity arguments made by the Respondents miss the mark for several reasons. The arguments focus on the wrong party to this lawsuit. The States' sovereign immunity is at issue, not some interest of Indian tribes. The Indian tribes' interests have been and continue to be protected through the trust responsibility the United States owes to the Indian tribes and

through the ability of the United States to sue a State to vindicate that responsibility. On the other hand, the States' interests are protected within our constitutional system by their sovereign immunity and by requiring the United States to exercise its judgment about when and under what circumstances it should be overridden in furtherance of the interests of the Indian tribes.

There are compelling differences between the United States, the several States, and Indian tribes. Their respective places in our constitutional system preclude the result urged by the Respondents. The fact that Indian tribes were a political presence at the time the United States of America came into existence does not require that tribes be viewed as participating in the "federal structure" of the political regime created by the Constitution, and they clearly did not. It is argued that the union created by the Constitution could not function peaceably unless Indian tribes were able to sue States in federal court without their consent. The response to that argument is obvious: the Union has functioned peaceably without an abrogation of state sovereign immunity, and if a need exists for greater tribal access to the federal courts, the United States, as a trustee, can provide it.

A. This Court's Jurisprudence Contradicts the Respondents' Theories about the Sovereign Immunity of States Vis-a-Vis Indian Tribes.

No opinion of this Court has yet articulated what the Respondents argue, i.e., that the principle of sovereign immunity underlying the Eleventh Amendment does not apply to suits brought by a government. If the Respondents are correct, certain implications follow that hardly

appear to be favorable even to Indian tribes. For example, if sovereign immunity does not bar a suit brought by governments, then this Court's decisions in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Puyallup Tribe v. Washington Game Dep't.*, 433 U.S. 165 (1977), were wrong in holding that a state cannot sue a tribe unless Congress has waived tribal sovereign immunity. If sovereign immunity does not bar suits brought by governments, why should a State not be able to sue an Indian tribe?

The Respondents' argument also makes unintelligible the decisions in *Arizona v. California*, 298 U.S. 558, 568 (1936) and *Kansas v. United States*, 204 U.S. 331, 341 (1907) that the sovereign immunity of the United States protects it from suit without its consent, even by a State. Similarly, the wisdom of this Court's ruling in *Monaco v. Mississippi*, 292 U.S. 313, 331 (1934), that a State cannot be sued by a foreign state without its consent, is also called into question by Noatak's argument.¹

In short, there is simply no persuasive basis for the claim that sovereign immunity does not apply to suits brought by governments.²

¹ The argument also means that *United States v. Texas*, 143 U.S. 621 (1892) (the United States can sue a State), and *South Dakota v. North Carolina*, 192 U.S. 286 (1904) (one State can sue another State) were wrongly decided because consent to suit implied from the structure of the Constitution would be unnecessary if sovereign immunity does not apply to suits brought by governments.

² The rationale for the doctrine of sovereign immunity, as stated by this Court in *Hans v. Louisiana*, 134 U.S. 1, 21 (1890), applies equally whether it is an individual or a government bringing suit, as long as the suit demands payment of public funds.

B. There is No Basis for the Argument that the American Political Structure Created by the Constitution Implies that Indian Tribes are able to Sue a State without its Consent.

Both Noatak and the amici Miccosukee Indian Tribe *et al.* argue that a correct understanding of the "federal structure" created by the Constitution leads to the conclusion that the States, by consenting to the Constitution, waived their sovereign immunity to suits brought in federal court by Indian tribes. Since no one could seriously argue that, by ratifying the Constitution, the States *expressly* consented to suits in federal court brought by Indian tribes, the "federal structure" argument must be an argument based on a theory of *constructive* consent. However, this Court does not favor the doctrine of constructive consent, especially when it is relied on to advance a claim that a constitutional right has been surrendered. As this Court stated in *Edelman v. Jordan*, 415 U.S. 651 (1974):

Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." (citations omitted)

Edelman, 415 U.S. at 673.

Moreover, if the structure of the Constitution was meant to allow an Indian tribe to sue a State in federal court without its consent, one would expect to find strong evidence for this in the text of the Constitution. However,

the text of the Constitution lends no support to this argument. See Pet. Br. at 11.

The lack of any language in the Constitution to support the "federal structure" argument leaves its proponents with a considerably more tenuous claim, i.e., that in the political system created by the Constitution, Indian tribes, in order to protect their very existence, must be able to sue a State without consent. Said another way, the ability of the Indian tribes to sue a State in federal court without the State's consent is necessary to the very functioning of the political structure and system created by the Constitution.

This approach, however, raises a very basic question. The Constitution is a compact entered into by the people of the several States. It sets out the nature and allocation of political power between the various States that were a party to the Constitution and the newly created Union of those States.³ As the tribal amici point out, Indian tribes were not "participants at the convention or signatories to the Constitution," and "... the Tribes' powers as governments do not derive from the Constitution or the United States, but are inherent." Miccosukee Tribe Br. at 10-11. Thus, if the States, by agreeing to the terms of the Constitution, consented to suits against themselves in federal court, we must then ask to whom was this consent given? Since the Indian tribes were not parties to the Constitution, the consent surely was not given to them. The consent could only have run either to the other States who were parties to the Constitution, the United States, or both.

³ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 423 (1792).

The conceptual problem with the "federal structure" argument is analogous to the difficulty faced by the Principality of Monaco in *Monaco v. Mississippi*, 292 U.S. 313 (1934), when it asserted that the States' consent to the "constitutional plan" runs to foreign states. This Court stated:

The waiver of consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates. We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State.

Monaco, 292 U.S. at 330.⁴

Since it is clear from the allocation of political power under the Constitution that the United States can bring suit against a State on behalf of Indian tribes,⁵ the claim

⁴ The Respondents try to distinguish *Monaco* on the theory that the Court was reacting to the subterfuge of transferring bonds from an individual to a foreign state to avoid the immunity bar. However, the theory fails in light of *South Dakota v. North Carolina*, 192 U.S. 286 (1904), where jurisdiction was found despite a similar transfer of bonds.

⁵ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *United States v. Minnesota*, 270 U.S. 181, 194, 195 (1926) and *United States v. Texas*, 143 U.S. 621 (1891).

The claim that through the Indian Commerce Clause the States gave Congress the authority to abrogate the States' Eleventh Amendment immunity in legislation involving Indian tribes is more problematic. It by no means follows that because Congress has the authority to abrogate the States' Eleventh Amendment immunity by virtue of its power to regulate commerce "among the several states," that it has the same authority by virtue of its power to regulate commerce "with the

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that the federal structure created by the Constitution requires that Indian tribes themselves must have this capacity would only make sense if there were no trust relationship between the United States and Indian tribes. However, there is such a relationship. Thus, there is nothing to sustain the premise that the federal system could not function unless Indian tribes are able to directly sue a State without its consent.

Another difficulty with the "federal structure" argument is that it is directly contradicted by Chief Justice Marshall's analysis in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831). If no constitutional basis could be found by Chief Justice Marshall on which to infer that Indian tribes had a right to sue a State in federal court, it becomes impossible to argue that the original plan of the Constitution required as much.

Finally, the "federal structure" argument overlooks the historical significance that the federal courts were not given federal question jurisdiction until 1875.⁶ Without federal question jurisdiction, the federal courts would have lacked any meaningful jurisdictional authority in disputes between States and Indian tribes. If "overwhelming implications" from the text of the Constitution lead one to conclude that the "federal structure" created by the Constitution requires that Indian tribes be able to

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Indian Tribes." See *Employees v. Missouri Dep't. of Public Health and Welfare*, 411 U.S. 279, 286, 287 (1973).

The status of the States and that of Indian tribes are fundamentally different under the plan of the Constitution. Thus, even if one assumes that the Indian Commerce Clause grants Congress the authority to abrogate a State's Eleventh Amendment immunity, it is obvious that Congress has not done so here. See *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989).

⁶ Judiciary Act of March 3, 1875, 18 Stat. 470.

sue a State without its consent, how could it be that the federal courts lacked subject matter jurisdiction to entertain such suits until 1875, over eighty-five years *after* the Constitution was adopted? The obvious answer is that the "federal structure" created by Constitution cannot reasonably be understood to require that result.⁷

C. 28 U.S.C. § 1362 is not a Delegation of Authority to the Indian Tribes.

Circle Village argues that Congress delegated to the Indian tribes the power of the United States to sue a State when it enacted 28 U.S.C. § 1362.⁸ Therefore, Circle Village argues that the States' sovereign immunity is no bar because jurisdiction will always exist in the federal courts for such suits. Circle Village Br. at 36-45.

⁷ Their argument is further undercut by the fact that a proposal made in 1794 by Senator Gallatin to amend the Eleventh Amendment to permit cases arising under treaties made under the authority of the United States was overwhelmingly rejected by Congress. See *Welch v. Texas Dep't. of Highways and Public Transp.*, 483 U.S. 468, 485, n.18 (1987). The defeat of Sen. Gallatin's proposal has even more significance because the earliest conflicts between tribes and States were over lands "guaranteed to the tribes in federal treaties." *Miccosukee Br.* at 14.

⁸ Noatak also argues that this Court should not apply the "clear statement rule" in order to determine if Congress intended 28 U.S.C. § 1362 to be an abrogation of sovereign immunity. Their theory is that in 1966, the current state of the caselaw did not provide Congress with any notice that such a rule would be required. We disagree. Although this Court in *Parden v. Terminal Railway of the Alabama State Docks Dep't.*, 377 U.S. 184 (1964) adopted a different rule, four justices in dissent in *Parden* expressly "foreshadowed" just such a rule. *Parden*, 377 U.S. at 198-200. In addition, the dissent noted that

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Circle Village's reliance on *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) is misplaced. Even the Court of Appeals below disagreed with their theory. *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1162 (9th Cir. 1990). *Moe* involved the interpretation of § 1362, but the jurisdictional issue in that case was whether suit was barred by the provisions of 28 U.S.C. § 1341. In *Moe*, jurisdiction under § 1362 for prospective injunctive relief was found to exist against the State of Montana, notwithstanding the language of § 1341, but there was no finding of jurisdiction on the issue of monetary damages. 425 U.S. at 474-475, n.14.⁹

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earlier decisions of this Court consistently held that waiver of immunity "will be found only where stated by 'the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction.'" *Parden*, 377 U.S. at 199-200, quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151 (1909). This Court also expressly rejected the same argument in *Dellmuth v. Muth*, 105 L.Ed.2d 181, 189-190 (1989). In addition, there is not even a hint of an intention to abrogate sovereign immunity in the legislative history.

⁹ Respondents also assert that obtaining prospective relief is somehow a part of this case. They seek to be "freed of the State executive policy" and the "continuing violation of federal law" that results in the abridgement of the respondents' "federally protected status as tribes and [treatment] . . . on racial rather than political grounds". Noatak Br. at 20.

These claims are wide of the mark. In 1985 the Alaska Legislature repealed the statute at issue in this case and replaced it with a statute (AS 29.89.050) expanding revenue sharing benefits to all unincorporated communities in the State of Alaska, including Noatak and Circle Village. The Respondents concede that this law is valid. Noatak Br. at 20. There can be no continuing violation of federal law because of such state action, since it is beyond dispute that there is no constitutional right to be the exclusive beneficiary of those revenue sharing benefits.

Circle Village's argument cannot stand scrutiny when the principles of sovereign immunity are properly considered. In *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), this court considered ancillary jurisdiction over an indemnification claim against the State of New York for alleged violations of federal law. The Eleventh Amendment was found to be a bar to jurisdiction. 470 U.S. at 252, n.26. Under those principles the same result occurs when jurisdiction is asserted directly under § 1362.¹⁰

The proposition that a State's sovereign immunity must give way to an Indian tribe's rights under the Commerce Clause because of their weak condition stands constitutional principle on its head. In every instance, in the absence of a clear textual abrogation of a State's sovereign immunity, the Constitution requires that rights or powers conferred by the Commerce Clause yield to a State's sovereign immunity.¹¹ As indicated earlier, the

¹⁰ A number of cases have considered the effect of the doctrine of sovereign immunity upon the jurisdiction conferred by 28 U.S.C. § 1362 and concluded that in the absence of consent to suit or a waiver of sovereign immunity, jurisdiction is lacking under 28 U.S.C. § 1362. See *Assiniboine and Sioux Tribes v. Bd. of Oil and Gas*, 792 F.2d 782, 792 (9th Cir. 1986); *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135, 1141 (5th Cir. 1974); and *Scholder v. United States*, 428 F.2d 1123, 1125 (9th Cir. 1970), cert. denied, 400 U.S. 942 (1970).

¹¹ *Pennsylvania v. Union Gas Co.*, ___ U.S. ___, 109 S.Ct. 2273 (1989); *Welch v. Texas Dep't of Highway*, 483 U.S. 468 (1987); *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279 (1973); *Ex Parte New York No. 1*, 256 U.S. 490 (1921).

proper focus should be on the identity of the defendant, not the plaintiff.

Finally, 28 U.S.C. § 1362 is not a delegation to Indian tribes of federal authority to bring lawsuits on behalf of Indians.¹² The statute provides access for Indian tribes to the federal courts for claims arising under federal law. The legislative history indicates the purpose of the statute was to remove the \$10,000 jurisdictional limitation of 28 U.S.C. § 1331 (especially for land claims whose value was often speculative and thus a hindrance to a court accepting jurisdiction), thus allowing Indian tribes to sue without the jurisdictional amount barrier when the federal government chose not to sue on their behalf. H.R. Rep. No. 2040, 89th Cong., 2d Sess. 3 (1966), reprinted in 1966 U.S. Code Cong. & Admin. News at 3146-47. Neither the legislative history nor the text support that it was intended to do anything more.

II. THE DETERMINATION OF TRIBAL STATUS REQUIRES A FACTUAL EXAMINATION.

Respondents' briefs create the erroneous impression that Petitioner believes no Alaska Native groups qualify as Indian tribes under federal law. On the contrary, we believe some Alaska Native groups may well meet the legal criteria for tribal status, while others – the Circle

¹² It is beyond dispute that the United States is held to "strict standards" in trust obligations to Indian tribes. See *Assiniboine and Sioux Tribes v. Bd of Oil and Gas*, 792 F.2d 782, 794 (9th Cir. 1986). If this were a delegation, one would expect that Congress, in undertaking such an important task as delegating its trust responsibility, would do so either by express language in a statute or at least by clear legislative history to that effect. Both are most noticeably absent.

Village Council, for example – could not possibly meet those criteria. Our point is that the merits of each group's claim to tribal status must be examined individually, because there is such a great variety in fact situations among Alaska Native groups. The Ninth Circuit erred by declaring that all Native groups within two categories were automatically tribes by operation of law, because some groups in those categories in fact have little resemblance to tribes and fail to meet existing criteria for tribal status.¹³ Respondents' briefs draw an erroneous portrait of the state of federal recognition of Alaska Native groups.

A. The Executive Branch has consistently refused to declare that all Alaskan Native groups are tribes.

Respondents claim that the Department of the Interior recognizes Alaska Native groups as tribes and base their theory on two factors: federal approval of constitutions under the Alaska Native Reorganization Act, 25 U.S.C. § 473a, and a list periodically published by Interior

¹³ In contrast is the holding of the Alaska Supreme Court that there are no tribes in Alaska except on reservations. *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988). The State believes this blanket approach to be just as erroneous as the Ninth Circuit's blanket approach in the opposite direction, since neither one involves examination of the actual facts surrounding a claim of tribal status.

of Indian tribes and Alaska Native villages eligible for federal services.¹⁴

¹⁴ As to Interior's two lists, one of tribes in the Lower 48 and one of Native entities eligible for federal services in Alaska, respondents claim that by publishing the two together, Interior has implicitly declared the two to be the same. But the Interior list itself is the best proof of Interior's refusal to label these groups as tribes. This is best illustrated by two versions of Interior's Alaska list. When it first published a list of tribes, in 1979, Interior listed no Native groups in Alaska at all. When the list was republished in 1982, it contained two separate lists, one for recognized tribes (all in the Lower 48 states) and another list of "Alaska Native Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs." The preamble to the list of Alaskan "Native Entities" explicitly stated that it was a list of entities in Alaska eligible for services from the BIA but which "are not historical tribes." The Alaska list, it said, was merely a "preliminary list show[ing] those entities to which the Bureau of Indian Affairs gives priority for purposes of funding and services." 47 Fed. Reg. 53133-53134 (1982). The Interior Department thus explicitly denied that it was a list of recognized tribes.

Subsequently, in 1988, the Interior Department modified the list by adding many additional groups and organizations, including regional, village, and urban corporations and "groups" created under the Alaska Native Claims Settlement Act. The Department's preamble was explicit: it was meant to include all Alaska Native groups receiving BIA assistance, but was not a statement of tribal status or governmental powers:

... Inclusion on a list of entities already receiving and eligible for Bureau funding and services does not constitute a determination that the entity either would or would not qualify for Federal Acknowledgment under the regulations, but only that no such effort is necessary to preserve eligibility. Furthermore, inclusion on or exclusion from this list of any entity should not be construed to be a determination by this Department as to the extent of the powers and authority of that entity. 53 Fed. Reg. 52832 (1988).

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Congress intended organization under the Alaska Native Reorganization Act to be available to a wide variety of Native groups, including tribes and non-tribal affinity groups.¹⁵ The Respondents argue that the purpose of the Alaska Native Reorganization Act was to make Alaska Natives eligible whether or not they had reservations; however the 1934 Indian Reorganization Act, 25 U.S.C. § 476, did not restrict its applicability to reservations, it was restricted to tribes. On the other hand, the Alaska Act made Native groups eligible whether or not they were tribes. Thus, mere organization under the Alaska Act cannot be taken as establishing tribal status.

These facts demonstrate one verity that is clear to all who have struggled with questions of Native sovereignty in Alaska over the last decade: Interior has consistently and adamantly refused to take a position on the status or powers of Alaska Native groups. It has instead left the question to a case by case examination by the courts, which have no other choice than to make a factual

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The preamble also notes that Alaska Native entities are eligible to obtain formal Federal Acknowledgment by following the procedures in the regulations, at 25 CFR Part 83. In summary, far from stating that these Alaskan Native groups are tribes, the Department has specifically disavowed any intention to acknowledge them as such.

¹⁵ See Pet. Br. at 30-37. In addition, Interior has never stated that approval of a constitution under the Alaska Native Reorganization Act is tantamount to recognition as a tribe; indeed, many of the approved constitutions state that the organization is of a group of persons with a common bond of residence or of occupation. Respondents have never explained how a fishermen's cooperative can be considered a tribe merely because it organized under the Alaska Act.

determination of whether any given claimant qualifies for tribal status.

B. Congress has never declared that all Alaska Native groups are tribes.

Respondents also claim that Congress has recognized all Alaska Native groups – or at least those listed in the Alaska Native Claims Settlement Act – as tribes, although they cannot point to any statute in which Congress has actually made such a declaration. Recognition, they claim, is “implicit” in Congress’s statutory treatment of Native groups. Their theory is insupportable.

1. Alaska Native Claims Settlement Act

Respondents claim that the Alaska Native Claims Settlement Act (ANCSA) was an implicit recognition of at least some Alaskan Native groups as tribes. To the contrary, Congress consciously avoided any mention of tribes and any involvement of Native councils or other entities such as respondents in fashioning ANCSA, and even abolished all existing reservations in Alaska except one. The list of entities eligible to charter ANCSA corporations is also far broader than “tribes” and included “any . . . group, village, community, or association.”¹⁶ Respondents argue that ANCSA was a “treaty substitute” because it dealt with matters that historically have been dealt with through an Indian treaty; therefore the entities dealt with in ANCSA should be considered to be tribes, since treaties are only made with tribes. The circularity of this argument is self-evident, but the most telling point is

¹⁶ 43 U.S.C. § 1602(c).

that contrary to the statements by the Respondents, there is no evidence that Congress saw ANCSA as a treaty or the Alaska Native lobbyists as tribes. In short, ANCSA is the best evidence that Congress has not chosen to deal with Alaska Natives as members of tribes, but has instead carefully avoided such designations.¹⁷

2. Other federal statutes

Respondents point to other federal legislation as indicating Congress considers Alaska Native villages to be tribes. Circle Village Br. at 22, n.21. However, in each of the listed statutes Congress made a distinction between tribes and these villages. For example, in three of the statutes,¹⁸ Congress defined as "tribes" all groups eligible for federal services to Indians, including urban corporations, ANCSA corporations, and any other organized "group or community of Indians." In short Congress used an expansive definition of "tribe" for those statutes in order to authorize delivery of federal services to Indians, regardless of whether they were members of

¹⁷ The most recent amendments to ANCSA explicitly disavow any intent to affect claims of "sovereign governmental authority" in "any Native organization." P.L. 110-241, sec. 2(8).

Respondents also make the argument that ANCSA must implicitly contain a recognition of tribal status, because only tribes can make land claims. This argument is self-evidently specious, since anyone can make a claim and the claimants in ANCSA never won a judgment of validity for their claims. Moreover, this settlement of claims explicitly referred to the claims, "if any", of Alaska Natives, 43 U.S.C. § 1603(b).

¹⁸ The Indian Financing Act of 1974, 25 U.S.C. § 1452(c); the Indian Self-Determination Act, 25 U.S.C. § 450b; and the Indian Health Care Improvement Act, 25 U.S.C. § 1903(8).

"tribes" in a political sense. In two of the statutes,¹⁹ Congress hedged on the entities listed as tribes by declaring that the definition fit them "if applicable" or if "recognized by the Secretary", thus making clear that it was not making a formal recognition through the statute, but merely applying the statute to tribes which have been recognized in other ways. In two of the statutes listed by respondents,²⁰ Congress added emphatic disclaimers that it was not, by including Alaska Native groups in the definition, validating any claim by them to a particular status or powers. In another of the statutes listed,²¹ Congress defined "municipality" to include tribes *or* Alaska Native villages or organizations, thereby making clear that the Alaska Native groups were not in the tribal category. And in one of the statutes cited by respondents, Congress limited its definition of "tribe" to Indian groups or communities exercising governmental authority over a federal Indian reservation, thereby eliminating all Alaska Native villages (except Metlakatla) from the definition of tribe.²²

In short, there is not a single federal statute that can be fairly read to be Congressional endorsement of the concept that Alaska Native villages and other Native groups are recognized tribes. The more easily reached conclusion is that Congress is willing to treat individual

¹⁹ Indian Tribal Government Tax Status Act, 26 U.S.C. § 7701(a)(40); Clean Water Act, 33 U.S.C. § 1377(h).

²⁰ Indian Tribal Government Tax Status Act, 26 U.S.C. § 7701(a)(40); Clean Water Act, 33 U.S.C. § 1377(g), (h).

²¹ Resource Conservation and Recovery Act, 42 U.S.C. § 6903(13)(A).

²² Clean Water Act, 33 U.S.C. § 1377(h).

Indians in Alaska as eligible for federal services as in the Lower 48, but it has not been willing to grant blanket recognition to Alaska Native groups as tribes. For Congress, as for the executive branch, tribal status remains a matter to be demonstrated by each claimant on the basis of its individual facts.

C. Some Alaska Native groups clearly do not qualify as tribes

Both respondents argue that Circle would qualify as a tribe under current law. This claim is disingenuous, given the facts in the record: The community was founded by non-Natives, had a non-Native majority until recent years; the Native council was not even formed until 1970; and most governmental and civic functions are performed by a different group, the multi-racial Circle Civic Community Association. See Exhibits to CR 21. Respondents cite no facts that would bring this group within the caselaw or the terms of 25 CFR Part 83.²³ If the Native residents of Circle constitute a tribe for federal purposes, with their thin basis for such a claim, then virtually any group of modern day Indians who maintain some sort of internal structure for some part of their lives also must be a tribe.

Our point, however, is not whether Circle is a tribe or not; it is that the process used by the Ninth Circuit to declare it a recognized tribe is improper. By applying a

²³ Circle cites a good deal of material regarding the Athabaskan Indians who inhabited the general area, but very little regarding the group of Indians who became residents of Circle. Circle Village Br. at 28-34. Respondent's only material relevant to the standards for tribal recognition comes from sources outside the record.

blanket rule, that *all* Native Villages and *all* entities organized under federal law are tribes, no matter what their individual circumstances and characteristics, the court brought within that category many groups with no discernible right to be called tribes. There is a great variety among Alaska Native groups. At one end of the continuum are Native organizations that appear to have as much right to tribal status as Lower 48 tribes with formal recognition. At the other end of the continuum are groups that bear no resemblance to Lower 48 tribes, do not have the history of tribes, and do not perform tribal functions. If the Ninth Circuit's "blanket recognition" were to prevail, there could be over 200 tribes and the real possibility of more, since so many groups are eligible to organize under the Alaska Native Reorganization Act. The only way to distinguish between true tribes and other Native groups and associations is to require fact-finding by the trial court of whether formal recognition by the federal government exists and, if not, whether the group meets the requirements of the caselaw and 25 CFR Part 83.^{24 25}

²⁴ Noatak claims that the state concedes it is a tribe and so there is no dispute in its case. It would be more accurate to say that the state believes that the Ninth Circuit's methodology for determining that it was a tribe was improper, but that if the proper methodology were used, a factual inquiry would probably show Noatak to be a tribe.

²⁵ We did not brief the question of whether a federal question exists in this case, believing it not to be certworthy. Nonetheless Noatak did brief it. Our only response is to point out one inaccuracy: Noatak claims that the Constitution permits states to discriminate in favor of Indians, citing dictum in an 1859 case. Noatak Br. at 8. We disagree. Recent caselaw says

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CONCLUSION

For all the reasons argued above the District Court lacked jurisdiction over this case. The decision of the Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted,

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that since states do not have a trust relationship with tribes, it is doubtful that they can provide benefits only to Indians without violating state equal protection provisions. *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463, 500 (1979); *Queets Band v. State of Washington*, 765 F.2d 1399, 1404 (9th Cir. 1985).

(5)
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DAVID HOFFMAN, COMMISSIONER,
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Respondents.

ON A WRIT OF CERTIORARI TO THE NINTH CIRCUIT
COURT OF APPEALS

BRIEF OF AMICI, THE STATES OF ALABAMA
ARIZONA, ARKANSAS, COLORADO, CONNECTICUT,
FLORIDA, HAWAII, IDAHO, MICHIGAN, MINNESOTA,
MISSISSIPPI, MONTANA, NEBRASKA, NEVADA,
NEW MEXICO, NORTH DAKOTA, OKLAHOMA,
PENNSYLVANIA, SOUTH CAROLINA,
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No. 89-1782

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1989

DAVID HOFFMAN, COMMISSIONER,
DEPARTMENT OF COMMUNITY AND REGIONAL
AFFAIRS, STATE OF ALASKA,

Petitioners,

v.

NATIVE VILLAGE OF NOATAK, et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE NINTH CIRCUIT
COURT OF APPEALS

BRIEF OF AMICI, THE STATES OF ALABAMA
ARIZONA, ARKANSAS, COLORADO, CONNECTICUT,
FLORIDA, HAWAII, IDAHO, MICHIGAN, MINNESOTA,
MISSISSIPPI, MONTANA, NEBRASKA, NEVADA,
NEW MEXICO, NORTH DAKOTA, OKLAHOMA,
PENNSYLVANIA, SOUTH CAROLINA,
WASHINGTON, WISCONSIN, WYOMING,
SUPPORTING REVERSAL

QUESTIONS PRESENTED

1. Does the eleventh amendment bar to retrospective monetary relief apply to Indian tribes the same as it applies to all others?
2. Does the equal protection clause forbid a state to extend benefits to Indians and nonIndians alike?

INTEREST OF THE AMICI

The amici curiae are a selected portion of the fifty sovereign states of the Union. They join their sister state, Alaska, in urging reversal.

The principal interest aroused by the decision under review goes to the heart of their sovereignty: Can a state be sued over its objection based on a mere jurisdictional statute empowering district courts to hear the claims of Indian tribes? This interest has a special importance here compared to other sovereign immunity, eleventh amendment cases. Here, the court below surmised states had no immunity against Indian tribes that requires congressional abrogation, notwithstanding the tribes have a sovereignty that bars states absent congressional abrogation.

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SUMMARY OF ARGUMENT

The eleventh amendment immunity bar applies to Indian tribes to the same extent it applies to all others, no more and no less.

A state's immunity from suit is the rule. It is the point of departure for analysis. This Court overlooked this fact in 1793 (Chisholm). A shock wave was felt throughout the nation, and the eleventh amendment was born. Now it is firmly fixed that a state's immunity can be overcome only by an unmistakably clear state waiver or by an unmistakably clear congressional abrogation.

Indian tribes are equally subject to this rule. In 1794 Congress rejected a proposed exception to the eleventh amendment for treaty-based suits. This Court thereafter applied the rule against Indian tribes. When it listed exceptions to the rule of immunity, Indian tribes were conspicuously omitted.

There is good reason why the rule should be the same for Indian tribes as for others.

A state's own citizens are subject to the rule. The constitutional framers could hardly have intended to give Indian tribes greater standing against a state than the state's own citizens. Nor did the framers conceive of Indian tribes as sister states who are exempt from the rule of immunity. The constitutional plan of union required a federal judiciary for the peaceful resolution of disputes among the plan's participants. The tribes were not participants in the plan of union. Likewise, the framers did not conceive of the states as having less sovereignty than Indian tribes. Since sovereign immunity bars states from suing Indian tribes absent an unmistakably clear congressional abrogation, it must follow that tribes cannot sue states absent an unmistakably clear congressional abrogation.

The court below conceded that Congress has not abrogated the states' immunity with unmistakable clarity. But it held that states have no immunity if the plaintiff is an Indian

tribe; it concluded that the states' consent to Congress's plenary power over Indian affairs was a consent to suit. But the court's error was in thinking it was enough for Congress to have the plenary power. It is not enough. Congress not only must have the power to regulate and to abrogate state immunity, it also must exercise the power to abrogate the immunity defense and must exercise it with unmistakable clarity.

Nor can unmistakable clarity be dispensed with because the federal government might have sued on the Indians' behalf. It cannot seriously be contended that Indian tribes occupy the same superior status vis-a-vis the states as does the United States. The rule of immunity applies even when a plaintiff's suit can be said to further some federal purpose. And the rule, that the unmistakable clarity appear on the face of the statute, is palpably violated by looking to legislative history to find evidence that

Congress meant to allow Indians to sue as the federal government's surrogate.

Finally, healthy federal-state relations require unmistakable clarity for abrogation. States have political as well as legal means to protect themselves from suits by the federal government or by a sister state. But they are excluded from the political processes of a sovereign or quasi-sovereign entity outside the union. State opportunity to participate in the processes of the constitutional plan can be assured only if Congress must speak with unmistakable clarity before empowering another sovereign to invade state treasuries. Surrendering state immunity through equivocal committee reports disservices this federalism.

Turning from the eleventh amendment question to the issue of equal protection, the plaintiff tribes had no fixed property right in Alaska's revenue sharing bonus. Even less did they have a property right to exclude

others from sharing in the bounty. It turns the fourteenth amendment on its head to conclude, as the ninth circuit did, that sharing the bounty in a race-neutral way is forbidden racism.

ARGUMENT

I. THE ELEVENTH AMENDMENT BAR TO RETROSPECTIVE MONETARY RELIEF APPLIES TO INDIAN TRIBES THE SAME AS IT APPLIES TO ALL OTHERS.

A. Immunity is the rule.

The general rule is that states are immune from suit, absent waiver or abrogation. The eleventh amendment to the Constitution provides that

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend. XI. Although the terms of the eleventh amendment speak only to suits by "Citizens of another State, or by Citizens or Subjects of any Foreign State," the amendment's reach is far broader than those literal words. It reaches to enshrine the full notion of sovereignty itself, whether or not particular plaintiffs are within the

enumeration, and even as to suits grounded on federal law. Hans v. Louisiana, 134 U.S. 1 (1890). It reaches to affirm the "fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III" of the Constitution. Pennhurst State Schools & Hosp. v. Halderman, 465 U.S. 468, 472 (1987).

This Court once deviated from the rule of state immunity. In Chisholm v. Georgia, 2 Dall. 419, 1 L.Ed. 440 (1793), this Court said that citizens of another state could sue a state. A "'shock of surprise'" spread through the nation. Monaco v. Mississippi, 292 U.S. 313, 325 (1934) (quoting from Hans v. Louisiana, 134 U.S. 1, 11 (1890)). For "[t]he suability of a State without its consent was a thing unknown to the law." Id. at 327 (Hans at 15). Justice Powell put it this way:

The reaction to Chisholm was swift and hostile. The Eleventh Amendment passed both houses of

Congress by large majorities in 1794. Within two years of the Chisholm decision, the Eleventh Amendment was ratified by the necessary 12 States.

Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468, 484 (1987) (footnote omitted).

Thereafter, immunity became the "'point of departure'" for analysis. Smith v. Reeves, 178 U.S. 436, 448 (1900). A citizen cannot sue his own state even though the amendment refers only to citizens of another state. Hans v. Louisiana, 134 U.S. 1 (1890). A corporation cannot sue a state, even a federally created corporation. Smith v. Reeves. Similarly, immunity bars suit by a foreign state though not within the express enumeration. Monaco v. Mississippi, 292 U.S. 313, 329 (1934). As stated by Chief Justice Hughes:

Manifestly, we cannot rest with a mere literal application of the words of §2 of Article 3, or assume that the letter of the Eleventh Amendment exhausts

the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention." The Federalist, No. 81.

Id. at 322-23 (footnote omitted). As stated by the federal court in Wisconsin,

The [Supreme] Court does not consider it determinative that the entity seeking to sue is not one of those referred to specifically in the Eleventh Amendment. Rather, it looks to the nature of the protection granted the states.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians et al. v. State of Wisconsin, No. 74-C-313-C (W.D. Wis. Oct. 11, 1990)(hereafter LCO v. Wisconsin), slip op. at 13. Immunity is the rule.

B. This Court has applied the rule of immunity to Indian tribes.

This Court has applied the rule of immunity to prevent tribal suits against states whenever the issue has come up.

In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), tribes sought to circumvent the eleventh amendment by claiming the status of a foreign state under this Court's original jurisdiction. This Court said the tribes were not foreign states. Chief Justice Marshall said the principle of immunity applied to an action by a tribe against a state. "[T]he framers of our Constitution had not the Indian tribes in view when they opened the courts of the Union to controversies between a State or the citizens thereof, and foreign states."

Id. at 18. The Chief Justice added:

At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of this

tribe. . . . This was well understood by the statesmen who framed the Constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union.

Id.

This Court's next occasion for applying the principle of immunity to tribes was nearly a hundred years later. In United States v. Minnesota, 270 U.S. 181 (1926), this Court held that the federal government was not barred from suing Minnesota on behalf of the Chippewa. Far from being obiter dictum, as the ninth circuit suggests, the holding was premised on its conclusion that the tribes could not themselves bring suit directly against a state.

It must be conceded that, if the Indians' are the real parties in interest and the United States only a nominal party, the suit is not within this court's original jurisdiction.

Id. at 193.

The reason the Indians could not bring the suits suggested lies in the general immunity of the state and the United States from suit in the absence of consent.

Id. at 195. This language has remained intact ever since. It recently was authoritatively cited in Arizona v. California, 460 U.S. 605, 614 (1983).

Moreover, when this Court listed exceptions to the rule, Indian tribes were conspicuously omitted. In an Indian context, this Court said:

Of course, the immunity of the state is subject to the constitutional qualification that she may be sued in this court by the United States, a sister state, or a foreign state. . . . Otherwise, her immunity is like that of the United States.

United States v. State of Minnesota, 270 U.S. at 195.

The prominence of this longstanding precedent deserves especial weight in light of Congress' plenary power to abrogate state

sovereign immunity. "[F]or here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." Patterson v. McLean Credit Union, 109 S.Ct 2363, 2370 (1989).

The prominence becomes even greater when it is recalled that the issue of treaty-based suits was considered at the time the eleventh amendment was adopted. On January 14, 1794, Senator Gallatin would have amended the eleventh amendment to "except . . . cases arising under treaties made under the authority of the United States." Annals of the Congress of the United States (Pub. Gales and Seaton 1849) p. 30. At the time of this proposed exception, the role of states in relation to Indian treaties was very much on Congress' mind. Congress had just passed the NonIntercourse Acts to prevent states from making agreements with tribes that might conflict with federal prerogatives over Indian

treaties and other regulatory matters. See Oneida v. Oneida Indian Nation, 470 U.S. 226, 231-32 (1985). The Senate roundly rejected Senator Gallatin's proposal to exempt treaty suits from the eleventh amendment bar. The vote was 23-2. See Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468, 485 (1987); Annals of the Congress of the United States (Pub. Gales and Seaton 1849) p. 30.

C. The rule should apply to Indian tribes the same as it applies to others.

1. Since a state's own citizens are subject to the rule, so also are Indian tribes.

A citizen cannot sue his own state without consent or abrogation. Hans v. Louisiana, 134 U.S. 1 (1890). More than that: it would be absurd to suppose otherwise.

Suppose that Congress when proposing the Eleventh Amendment had appended to it a provision that nothing therein contained should prevent a State from being sued by its

own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

Id. at 12 et seq. (quoted in Monaco v. Mississippi, 292 U.S. at 326; emphasis added).

If a citizen cannot sue his own state, the same must be equally true for Indian tribes.

2. The tribes do not come within the exception for sister states.

The ninth circuit reasoned that tribes are like states. Being like states, they fall within the exception to the immunity rule accorded to sister states. Native Village of Noatak v. Hoffman, 896 F.2d 1157, 1163 (9th Cir. 1990).

Even were tribes like states, they could not recover money to benefit their members, as they attempt to do here. Sister states cannot

recover damages that benefit individuals, for example by claiming injury to the state's general economy, although they can sue to protect their sovereign state interests. See Hawaii v. Standard Oil Company of California, 405 U.S. 251, 258 n. 12, 264 (1972). Thus, to the extent they are like sister states, tribes' actions to recover money benefits for their members are barred.

More critically, tribes are not like states. The federal government makes treaties with nations, not states. Whereas the tribes originally were nations, they became domestic dependent nations as the colonies settled in, became the fledgling United States of America, and expanded westward. See The Cherokee Nation v. The State of Georgia, 30 U.S. (5 Pet.) 1, 16, 18 (1831). Thereafter they could not be considered states or nations. See United States v. Kagama, 118 U.S. 375, 385 (1885). Chief Justice Marshall said it had been "shown

conclusively that [a tribe is] not a State of the Union." The Cherokee Nation.

The ninth circuit's conclusion that Indian tribes are like states of the union is wholly devoid of merit. Sister states are exempt from the rule of immunity because they were co-partners in the constitutional plan of union. A federal forum to settle disputes between the states was "essential to the peace of the Union." Monaco v. Mississippi, 292 U.S. 313, 328 (1934). Exempting the federal government itself was "inherent" in the plan; without it "'the permanence of the Union might be endangered.'" Id. at 329. The tribes were not co-partners in the plan of union. That plan -- by which implied and express powers were given to a central government -- was by, between, among, for, and on behalf of states. The tribes had no part. The states did not consent to a union of tribes and sister states; nor did they consent to governance by

the federal government and the tribes. As the Seventh Circuit has said:

The Constitution of the United States apportions sovereign power between the United States and the several states, not among the United States, the several states and the Indian tribes.

Wisconsin v. Baker, 698 F.2d 1323, 1332 (7th Cir. 1983).

It requires direct participation in the plan of union to benefit from the right to sue despite the eleventh amendment. In holding that the eleventh amendment bars a foreign state from suing, this Court said:

The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a state, which inheres in the acceptance of the Constitutional plan, runs to the other states who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates.

Monaco v. Mississippi, 292 U.S. at 330.

Precisely the same can be said of tribes. As stated by the federal court in Wisconsin:

Implicit in the Court's analysis in Monaco is the idea that each state had as much to gain as it did to lose by entering into a union and submitting itself to suit by the other states and by the United States. It is this reciprocal benefit that forms the basis for inferring a waiver of the states' sovereign immunity from its "acceptance of the Constitutional plan." Although each state's sovereignty was diminished by surrender of its immunity to suit by other states, each state also gained the power to sue other states. At the same time, each state lost an aspect of its sovereignty by permitting the United States to sue it, but each state gained the security of knowing that the United States had the power to take action against an individual state that threatened the good of the nation.

LCO v. Wisconsin, 74-C-313-C (Western District of Wisconsin, October 11, 1990), slip op. at 18. Unquestionably, Indian tribes are not within this compact.

3. Since Indian sovereignty applies against the states, state sovereignty applies against the Indian tribes.

The ninth circuit's decision accords greater sovereignty to tribes than to states. A state cannot sue a tribe unless Congress has unequivocally waived the tribe's sovereign immunity. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978); Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, 172-73 (1977). But under the ninth circuit's holding, not only is there no requirement of an unmistakably clear abrogation, there is no state immunity to protect.

The constitutional framers would have been incredulous by this result. As stated by the federal court in Wisconsin:

What is determinative is whether it can be inferred from the relationship established between the states and the Indian tribes in the constitutional plan that the states implicitly or necessarily waived their

sovereign immunity and consented to be sued by Indian tribes. In my view it cannot be. Indeed, the natural inference is to the contrary, in view of the absence of reciprocal benefit and the states' reliance upon the federal government to mediate their disputes with the Indians. Therefore, I conclude that although the Eleventh Amendment makes no specific reference to suits against the states by Indian tribes, it must be read as precluding such suits.

LCO v. Wisconsin, slip op. at 20.

- D. Congress' power over Indian affairs does not exempt Indian tribes from the rule of immunity.

1. Congress' power to regulate Indians does not empower it to abrogate state immunity.

This Court's 5-4 decision in Pennsylvania v. Union Gas Co., 109 S.Ct. 2273 (1989), held that Congress, when acting under its general commerce clause power, U.S. Const., art. I, sec. 8, may abrogate a state's immunity from

suit. But it does not necessarily follow that Congress may abrogate state immunity in Indian matters as well, even though Congress' Indian Commerce Clause power is located within the same clause of the Constitution as its general commerce power. For Indians have their own sovereignty; states may not sue them without a congressional abrogation. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978); Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, 172-73 (1977). Unique issues of federalism are raised if a state cannot sue a sovereign when Congress allows that sovereign to sue the state.

If Pennsylvania v. Union Gas Co. logically means Congress can abrogate a state's immunity from suit by an Indian tribe, with or without abrogating the tribe's immunity from suit by a state, then Pennsylvania v. Union Gas Co. deserves prompt

rejection. The amici urge this Court to do so.¹

The amici rely on the reasoning of the dissenters in Pennsylvania v. Union Gas Co. as to why Congress' power under Article I of the Constitution does not entail the power to abrogate a state's immunity from suit. There is another consideration as well. The federal government has no powers except as granted by the Constitution. The states, by contrast, have unlimited powers except as limited by the Constitution. See Garcia v. San Antonio Metro., 469 U.S. 528, 549-50 (1985). This elementary point of civics is inverted if the states with otherwise unlimited sovereignty can be sued over their objection by authority

¹ The amici urge reconsideration only of that part of Pennsylvania v. Union Gas Co. that authorizes Congress to abrogate state immunity when acting under its Article I powers. The authority to abrogate under the fourteenth amendment, of course, has already been established. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

of the federal government whose power is delegated only.

2. Even if Congress has absolute power under the Indian Commerce Clause to abrogate state immunity, it must do so with unmistakable clarity.

The ninth circuit failed to appreciate this Court's two-stepped analysis: (1) Does Congress have power to abrogate immunity? (2) If Congress has that power, has it exercised it with unmistakable clarity? The ninth circuit mistakenly believed answering the first question would dispose of the second because the states surrendered their immunity when they gave Congress plenary power over Indian affairs.

But this mistake swallows the rule requiring abrogation by unmistakably clear language even where Congress' regulatory power is plenary. This Court requires answers to both questions. For example, Congress' power

of regulation in admiralty is complete, but this Court nevertheless has required abrogation of state immunity with unmistakable clarity in the language of the statute itself. Welch v. State Dept. of Highways and Public Transp., 483 U.S. 468, 474 (1987). Despite Congress' extensive regulatory power in bankruptcy, this Court nevertheless has held that a federal trustee cannot sue a state absent congressional abrogation in unmistakably clear language on the face of the statute. Hoffman v. Conn. Dept. of Income Maintenance, 109 S.Ct. 2818, 2822 (1989) (plurality). Similarly as to the commerce power itself: Even if the power to regulate commerce includes the power to override the states' immunity from suit, and even if the states consented to this power in the plan of union, this Court will not conclude that Congress has overridden this immunity unless it has done so clearly. Pennsylvania v. Union Gas Co., 109 S.Ct. 2273, 2281 (1989).

E. Sovereign immunity is not abrogated even if legislative history suggests tribes could sue in place of the federal government.

1. Even if legislative history could be examined, it is equivocal and not unmistakably clear.

The ninth circuit agreed §1362 does not meet the rule of unmistakable clarity for purposes of finding a congressional abrogation of state immunity. See Noatak, 896 F.2d at 1162, 1164. The statutory language on its face says nothing about abrogating state immunity.² And the rule of unmistakable clarity forbids inquiry into legislative history: the unmistakably clear abrogation

² That statute provides that the district courts "shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

must appear on the face of the statute; resort to legislative history is not permitted. See Dellmuth v. Muth, 109 S.Ct. 2397, 2401 (1989).

Title 28 U.S.C. §1362 on its face is merely a jurisdictional statute. A statute that is merely jurisdictional does not create a cause of action or provide a remedy. See Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). Jurisdictional statutes do not create substantive rights or remedies against a sovereign. United States v. Testan, 424 U.S. 392, 398 (1976); Monaco v. Mississippi, 292 U.S. at 330. They do not empower district courts to formulate federal common law. See Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630, 640-41 (1981). The substantive right must be found in some source other than a mere jurisdictional statute. United States v. Mitchell, 463 U.S. 206, 215-16 (1983). Thus, far from abrogating a state's immunity from suit, §1362 does not even create a cause of

action or provide a remedy for a wrong by a nonsovereign.

Besides the facial infirmity of the statute to effect an abrogation of immunity, its legislative history is vague at best. Its principal purpose was to avoid the \$10,000 jurisdictional limit of former 28 U.S.C. § 1331. And, in some ill-defined respects, it was to give the tribes the same access to a federal district court as the United States would have when suing on their behalf. See Annot., 65 ALR Fed. 649, 654 (1983); Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 559 n. 10 (1983); Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 472 (1976). This Court characterized its history as equivocal. It was to provide "'the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys.'" Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 472 (1976).

While this is hardly an unequivocal statement of intent . . . , it would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising "under the Constitution, laws, or treaties" would be at least in some respects as broad as that of the United States suing as the tribe's trustee.

Id. at 473 (emphasis added). Further:

We think that the legislative history of §1362, though by no means dispositive, suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf.

Id. at 474 (emphasis added). These underscored words are terms of equivocation, not unmistakable clarity.

Thus, this Court already has ruled that §1362 does not meet the standard of unmistakable clarity, even if legislative history could be reviewed.

The Second Circuit, in reliance on Moe, concluded this history overcame the eleventh amendment defense. Oneida Indian Nation of

New York v. State of New York, 691 F.2d 1070, 1080 (2nd Cir. 1982). So did a number of district courts, see cases collected in Red Lake Band of Chippewas v. Baudette, Minn., 730 F. Supp. 972, 982 (D. Minn. 1990), despite an earlier Eighth Circuit decision upholding the immunity bar. Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Cir. 1974). But all those cases preceded³ this Court's insistence that the unmistakably clear abrogation be inserted into the language of

³ Red Lake is the sole exception, and it did not note the rule of facial explicitness. As stated in LCO v. Wisconsin, slip op. at 22:

The [Red Lake] court did not discuss the effect of the Supreme Court's approach to abrogation, and it relied upon the Ninth Circuit's first opinion in Native Village of Noatak v. Hoffman, published at 872 F.2d 1384, holding that §1362 expressed an unmistakable intention to authorize Indian tribes to sue where the United States could sue on their behalf. This opinion was withdrawn and superseded by the opinion published at 896 F.2d 1157 For these reasons, Red Lake Band is of little help to plaintiffs' position.

the statute itself.⁴ If this Court's insistence is obeyed, §1362 will be found not to abrogate the immunity defense. See LCO v. Wisconsin; Native Village of Venetie v. State of Alaska, 687 F. Supp. 1380 (D. Alaska 1988).⁵

Moreover, sovereign immunity was not an issue in Moe. This Court was engaging only in statutory construction of two jurisdictional statutes. It held that Congress intended to exempt Indian tribes from the anti-injunction act, 28 U.S.C. §1341, because the tribes could stand in the shoes of the federal government. Moe did not hold or state as dictum, imply or

⁴ We note also that all those cases proceeded on the premise that the tribes are subject to the rule of immunity like everyone else, with the sole exception of the instant ninth circuit decision.

⁵ Native Village of Venetie was effectively overruled in the ninth circuit's first opinion, which later was withdrawn and superseded by the instant opinion. See footnote 3 above.

even meekly hint, that §1362 abrogates a state's immunity defense.

2. Immunity is not abrogated even if a plaintiff also serves a federal objective.

In the unlikely event this Court holds that §1362 is more than merely jurisdictional, the rule of immunity bars this suit anyway. It makes no difference if a tribe's suit is within the contemplation of a federal program or if a tribe is suing as the federal government's surrogate for relief the federal government could have obtained despite the eleventh amendment.

To illustrate, the eleventh amendment bars state employees' recovery of overtime pay owed to them by the state as their employer under the Fair Labor Standards Act (FLSA), 29 U.S.C. §216(b). It makes no difference that the federal government could have recovered the overtime pay for them. Employees v.

Missouri Public Health Dept., 411 U.S. 279, 285-86 (1973).

The rule of immunity applies to any federally based suit. Hans v. Louisiana. It is irrelevant even if the private plaintiff is serving some federal purpose when suing the state. In civil rights legislation, for example, Congress has provided for attorney's fees to prevailing private parties. Congress uses private parties as a means to discharge its power to implement the fourteenth amendment. The plaintiff stands as a "private attorney general." See Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (per curiam). Yet the rule of immunity bars the civil rights action against a state, absent an unmistakable waiver or abrogation, even though the private plaintiff is executing Congress' awesome power to enforce the fourteenth amendment against an unwilling state. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 244-47 (1985).

F. The principles of federalism require the rule that state immunity can be overcome only by an unmistakably clear abrogation on the face of the statute.

There are two principled reasons for insisting that Congress speak with unmistakable clarity before abrogating the immunity defense.

First, it is a most serious disruption of state-federal relations for Congress to authorize a damage suit against a state. This Court said in Atascadero, 473 U.S. at 242-43:

Congress' power to abrogate a State's immunity means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain ... In view of this fact, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment.

See also Dellmuth, 109 S.Ct. at 2400

(abrogation of sovereign immunity "upsets the fundamental constitutional balance between the

Federal Government and the States" and places "considerable strain on the principles of federalism that inform Eleventh Amendment doctrine"). As stated in LCO v. Wisconsin, slip op. at 24:

Under this broad interpretation of Eleventh Amendment immunity, it is Congress's abrogation of the states' sovereign immunity that upsets the balance of federal and state power. It is immaterial who benefits by gaining the ability to sue the states in federal court. It is just as much an invasion of the states' sovereignty and a change in the balance of state and federal power for congress to abrogate the states' immunity from suit by Indian tribes as it is for Congress to abrogate the states' immunity from suits brought by individuals.

Second, the rule of unmistakable facial clarity helps safeguard the states' opportunity to participate in the political processes of the plan of union to protect their interests.

But, the principal and basic limit on the federal commerce power is that inherent in all

Congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 556 (1985). It disservices federalism generally, and state sovereignty in particular, to abrogate immunity based on inference upon inference drawn from committee reports.

And it is so easy for Congress to express itself unmistakably on the face of the statute!

II. THE EQUAL PROTECTION CLAUSE DOES NOT FORBID A STATE TO EXTEND BENEFITS TO INDIANS AND NONINDIANS ALIKE.

The ninth circuit held that a federal question of race discrimination was presented by Alaska's expanding its revenue sharing program, which had benefitted only

unincorporated communities with native village governments, to include all other unincorporated communities as well.

The plaintiffs alleged that they were authorized to receive their pro rata share of funds appropriated by the Alaska Legislature in a statute which provided "the state shall pay \$25,000 to a Native Village government for a village which is not incorporated as a city under this title." Alaska Stat. §29.89.050. The plaintiffs also alleged that Alaska expanded the class of eligible recipients to include others solely because of the racial ancestry of individual members of the villages and that this decision violates federal equal protection, with the result that plaintiffs' share was diluted. The ninth circuit acknowledged that Alaska had no duty to vote a bonus of \$25,000 to each Native Village. Noatak, 896 F.2d at 1165. It also acknowledged that the Commissioner's action was based on Alaska's "non-racial" criterion

for the distribution of state benefits. Moreover, as the dissent pointed out, Alaska's action was required by its own "equal protection and public purpose" clauses in its Constitution. However, the court ruled that changing the original scheme because the original classification was based "on [a] status [that] had an ethnic origin is itself a violation of the Constitutional command not to discriminate on the basis of race." To support its conclusion, the court said:

Any governmental action based on the racial character of those affected is presumptively invalid. Washington v. Seattle School Dist. No. I, 458 U.S. 457, 485 (1982) (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979)).

896 F.2d at 1165.

But Washington v. Seattle School Dist. only held that an initiative which prohibited school boards from busing students for racial reasons, but permitted busing for virtually

every other reason, violated equal protection.

This Court cautioned that:

the simple repeal or modification of desegregation or anti-discrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.

458 U.S. at 483. This Court found, however, that:

Initiative 350, however, works something more than the 'mere repeal' of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the state, by lodging decision-making authority at a new and remote level of government.

458 U.S. at 483. This Court continued:

Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary, to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations.

Id. (emphasis added).

Thus, the Seattle School District decision was based on this Court's finding that the initiative burdened minority interests and that it was intended to do so. Also see Hunter v. Erickson, 393 U.S. 385, 387 (1969)(striking a referendum requirement for ordinances regulating real estate transactions on the basis of race, inter alia, because the referendum requirement was intended to, and did, burden minorities by making it more difficult to pass antidiscriminatory legislation).

Alaska, on the other hand, seeks race-neutrality. The tribes do not allege that the Commissioner's action was designed to accord disparate treatment; instead, they allege that the Commissioner was addressing the racial classification in the original enactment and that their share was diluted as a result. This is no more than a modification of an affirmative action program like that upheld in Crawford v. Los Angeles Board of Education,

458 U.S. 527 (1982). There, this Court found an amendment to the California Constitution, which prohibited state courts from ordering busing unless a federal court would do so to remedy a violation of the federal equal protection clause, did not violate the equal protection clause. This Court reasoned:

The Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters (footnote omitted). This distinction is implicit in the Court's repeated statement that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.

* * *

Were we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our heterogeneous population. States would be committed irrevocably to legislation that has proved

unsuccessful or even harmful in practice. And certainly the purpose of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities (footnote omitted). Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects (footnote omitted). Yet these would be the results of requiring a State to maintain legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place.

458 U.S. at 538-540.

Plaintiffs miss Justice Blackmun's fundamental point that it is not racism to note racism in order to cure it. "[T]o get beyond racism, we must first take account of race." Regents of University of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring). Forbidden racism occurs only by closing off a class to others with race being

the dispositive determinant. See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking a city ordinance that set aside an unyielding 30% of construction contracts for minorities where race was the sole determinant); San Antonio School District v. Rodriguez, 411 U.S. 1, 20 (1973) (disadvantaged class suffered "absolute deprivation"); Frontiero v. Richardson, 411 U.S. 677, 687 (1973); (the "entire class" was deprived without regard to the abilities of individual members); and Loving v. Virginia, 388 U.S. 1, 11 (1967) (color was "the" test or the "sole" test).

It is an entirely different matter to consider the fact of race in order to help cure racism. See Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990) (upholding benign race-conscious measures mandated by Congress, even if not remedial, especially if only a "plus" factor to be considered with others); McDonnell Douglas Corp. v. Green, 411 U.S. 792,

802 (1973)(a factfinder must consider the race when applying the evidentiary rule that a plaintiff can establish a prima facie case by showing that he belongs to a racial minority); Furnco Construction Corp. v. Waters, 438 U.S. 567, 580 (1978)(the McDonnell Douglas allocation of proof formulary that puts race into the calculus, is legitimate because "experience has proved that in the absence of any other explanation [discrimination] is more likely than not"); Teamsters v. United States, 431 U.S. 324, 339-42 (1977)(racial composition of work force can be considered as indirect evidence of employer bias).

Here, the Alaska Commissioner expanded the revenue sharing program to avoid a race-closing class forbidden by the Alaska Constitution. There is no claim that the Alaska Constitution has a disparate impact on minorities or even that it violates the equal protection clause. Therefore, the Commissioner's decision to comply with the

Alaska Constitution, and modify legislation in a neutral fashion to eliminate racial classifications, does not form a basis for an equal protection challenge.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL LEAGUE OF CITIES,
AND U.S. CONFERENCE OF MAYORS
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether the doctrine of state sovereign immunity bars an Indian tribe from bringing a damages action against a State in federal court without its consent.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1782

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

v. *Petitioner,*

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

On Writ of Certiorari
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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL LEAGUE OF CITIES,
AND U.S. CONFERENCE OF MAYORS
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case features an issue of paramount concern to *amici*: the

constitutional principle of state sovereign immunity and the extent to which that principle protects States from being subjected to suit in federal court against their will. This principle, a pivotal component of the federal-state balance as understood by the Framers, has been construed by this Court as an important and lasting attribute of state sovereignty, one that States retain except to the extent that immunity from suit is inconsistent with the constitutional plan.

Amici believe that the Ninth Circuit's conclusion that the States waived their immunity merely by having ceded to Congress legislative authority over Indian affairs rests on a fundamental misunderstanding of state sovereign immunity doctrine. Although acknowledging that no act of Congress had deprived the States of their immunity, and that respondents' suit did not come within any other exception to the rule of immunity, the lower court nevertheless held that Alaska was subject to suit based on what the court perceived to be required by "principles of federalism." This view marks a dangerous departure from this Court's precedents, and, if upheld, extends an unwarranted invitation to the federal courts to intrude upon the States' sovereign prerogatives. For this reason, *amici* submit this brief to assist the Court in its resolution of the case.¹

STATEMENT

This brief addresses only the first of the questions presented by the petition—whether the doctrine of state sovereign immunity bars an Indian tribe from bringing a damages action in federal court against the State of Alaska without the State's consent. This statement is therefore limited to developments below that bear on this issue.

¹ The parties' letters of consent, pursuant to Rule 37.3 of the Rules of the Court, have been filed with the Clerk.

In 1980, the Alaska legislature passed a revenue-sharing statute providing financial assistance to unincorporated communities with "a Native Village government." Alaska Stat. § 29.89.050. Shortly after the statute was enacted, the State's Attorney General advised the legislature that the law violated several provisions of the Alaska Constitution because it denied similar benefits to unincorporated communities without a Native Village government. In order to comply with the state constitution, petitioner, Commissioner of the State's Department of Community and Regional Affairs, began to administer the statute for the benefit of all unincorporated communities, whether or not they had Native Village governments. Pet. App. B5-B6.

Respondents, two Native Villages receiving benefits under the original plan, brought suit against the State in federal district court alleging that broadening the class of recipients under the statute violated the Equal Protection Clause of the United States Constitution (by deliberately reducing respondents' benefits on the basis of race), as well as other provisions of federal and state law. In addition to declaratory and injunctive relief, respondents sought damages from the State in the amount that their respective shares under the revenue-sharing program were diluted as the result of broadening the program. Pet. App. B5-B6.

The district court dismissed the case on the alternative grounds that the suit was barred by the Eleventh Amendment and that, in any event, the court lacked subject matter jurisdiction because no federal question was presented. Pet. App. B7.

The Ninth Circuit reversed. After finding that respondents were Indian tribes for purposes of 28 U.S.C. § 1362,² the court of appeals held that the State's sovereign immunity posed no bar to the suit. The court ac-

² We express no view as to the merits of this holding.

knowledge that Congress had not expressly subjected the States to suit by Indian tribes in federal court and therefore had not abrogated the States' immunity with the required "unmistakably clear language." Pet. App. B12, quoting *Welch v. Texas Dep't of Highways & Public Transportation*, 483 U.S. 468, 478 (1987) (plurality opinion). The court nevertheless held that the State enjoyed no immunity with respect to suits by Indian tribes because the Indian Commerce Clause, Art. I, § 8, cl. 3, "constitutes consent by the states to federal jurisdiction." Pet. App. B13. On this basis, the lower court found it "inherent in the plan of the Constitution" (*id.* at B18) that States are subject to suit by Indian tribes in federal court.

SUMMARY OF ARGUMENT

Finding nothing in the language of the Eleventh Amendment that explains the circumstances in which this Court's cases authorize or prohibit suit against States in federal court, the court of appeals concluded that this Court had opened the door to an open-ended policy analysis under which "the Court's own gloss, the Court's own readings of the amendment's spirit and purpose are what count." Pet. App. B10. Undertaking such a policy-oriented analysis itself, the court of appeals held that "'principles of federalism'" would not be threatened by allowing Indian tribes to maintain suit against the States in federal court. *Id.* at B11 (citation omitted).

The court of appeals' approach was fundamentally misconceived. The language of the Eleventh Amendment has never been the exclusive obstacle to state amenability to suit in federal court because the rule that States may not be sued in federal court is not grounded in that Amendment. The provenance of that rule lies instead in the historic principle of sovereign immunity, which the States retained in joining the Union, surrendering it only to the extent necessary to achieve the constitutional plan.

I. It is inherent in the nature of sovereignty that a State cannot be subjected to suit without consent. As sovereign governments, the States that joined the Union enjoyed such immunity from suit, and retained this immunity in forming a new Union. Neither the creation of a federal judiciary nor the general grants of jurisdiction to the federal courts under Article III of the Constitution were intended to limit or qualify state sovereign immunity. Thus, this Court's decisions have repeatedly confirmed that the doctrine of state sovereign immunity not only survived ratification of the Constitution, but is an essential underpinning of the system of government adopted by the Framers and ratified by the States.

The jurisdictional limitations of the Eleventh Amendment confirm, but by no means exhaust, the constitutional premises of state sovereign immunity. Correcting a holding of this Court that permitted a damages suit against a State by the citizen of another, the Amendment erected a specific jurisdictional barrier to certain suits against States in order to restore the original understanding of Article III. Although bottomed on the same respect for state sovereignty that more generally informs immunity doctrine, the Eleventh Amendment does not and was never intended to provide a comprehensive articulation of state sovereign immunity. Rather, the Amendment was a specific jurisdictional corrective and, as such, is "but an exemplification" of state sovereign immunity. *Welch v. Texas Dep't of Highways & Public Transportation*, 483 U.S. 468, 480 (1987) (plurality opinion) (internal quotations and citations omitted).

While state sovereign immunity is not explicitly qualified by any provision of the Constitution, it is nevertheless accepted that the States surrendered some of their immunity by joining a confederation of other sovereigns and agreeing to subject themselves to a supreme federal law. State sovereign immunity is thus

limited to the extent required by the constitutional plan. Such a limitation, however, has been found by this Court in only two discrete contexts. First, the Court has long recognized that the States may not invoke their traditional immunity against federal court suits by the United States or by a sister State. Second, the Court has more recently indicated that Congress, pursuant to legislative authority ceded to it by the States, may abrogate state sovereign immunity provided that it expresses its intention to do so in clear and unequivocal statutory language.

II. This case falls into neither of these exceptions. Assuming that respondents qualify as Indian tribes for present purposes—a question that we do not address—it is plain that the status of Indian tribes within the constitutional plan is not comparable to that of the States or the United States. Thus, while the Framers would have expected States to be amenable to suit brought in federal court by other States or by the United States, they would have found unthinkable the notion that by ratifying the Constitution the States thereby acquiesced to suit by Indian tribes. The Framers' conception of the relationship between tribes and the Union was one in which the latter was obliged to vindicate the interests of the former through appropriate exercises of legislative and executive authority. And, although Congress may some day choose to subject the States to direct suits by Indian tribes in federal court, it has yet to do so. Having concluded as much, the court below should have ended its inquiry and barred this case from going forward.

The court of appeals' reliance on the Indian Commerce Clause was misplaced. The Clause does no more than evidence the States' recognition that Congress should have plenary substantive authority over Indian affairs. The Clause does not of its own force abrogate state sovereign immunity. Indeed, no provision of Article I has

the self-abrogating force that the Ninth Circuit ascribes to the Indian Commerce Clause. The decision below both attaches undue significance to the Indian Commerce Clause and renders superfluous the requirement, repeatedly reaffirmed by this Court, that Congress may abrogate the States' immunity only through a statute addressed specifically to that end.

ARGUMENT

I. STATES RETAIN THEIR SOVEREIGN IMMUNITY FROM SUIT UNLESS THEIR SURRENDER OF IMMUNITY IS INHERENT IN THE CONSTITUTIONAL PLAN.

A. Under our federal system, the States are not ordinary litigants. On the contrary, because the States retained essential elements of sovereignty under the federal plan, any analysis of the States' amenability to suit must begin from the premise that, as sovereign governments, they are immune from suit absent their consent. As Hamilton explained, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." *The Federalist* No. 81, at 487 (C. Rossiter ed. 1961) (emphasis omitted).

The "inherent" doctrine of sovereign immunity described by Hamilton not only predated the founding of our Nation, but survived the ratification of the Constitution. Neither the Framers nor the States contemplated that the mere creation of a federal judiciary or assignment of judicial power to the federal courts in any way limited state sovereign immunity. Whatever else the States may have intended in surrendering some portion of their sovereignty to the Union, they did not thereby relinquish their immunity from suit in the newly created federal tribunals. To the contrary: "That a State may not be sued without its consent is a fundamental rule of

jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given * * *." *Ex Parte State of New York*, No. 1, 256 U.S. 490, 497 (1921). See also *Welch v. Texas Dep't of Highways & Public Transportation*, 483 U.S. 468, 479-480 (1987) (plurality opinion); *Employees v. Missouri Dep't of Public Health & Welfare*, 411 U.S. 279, 291-292 (1973) (Marshall, J., concurring in the result).

Although the doctrine of state sovereign immunity is often discussed in connection with the jurisdictional limitations of the Eleventh Amendment,³ the two are not the same. Indeed, we believe that the relationship between the doctrine and the Amendment has over time been the cause of some confusion, as reflected in the decision below. The Eleventh Amendment was crafted to overcome the suggestion that Article III of the Constitution, in extending the judicial power to certain suits involving States, was perforce an abrogation of state sovereign immunity. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The Amendment rectified the mistake in that reasoning by limiting the judicial power in the only situation in which Article III by its express terms had suggested that a State might be subject to private suit in federal court.⁴ As its plain language indicates,

³ The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

⁴ As explained in *Employees* (411 U.S. at 291-292) (Marshall, J., concurring in the result):

It had been widely understood prior to ratification of the Constitution that the provision in Art. III, § 2, concerning "Con-

the Amendment was intended as a specific and discrete restriction on the *jurisdiction* of the federal courts—in particular, a restriction on the federal judicial power as to claims against a State by "Citizens of another State, or by Citizens or Subjects of any Foreign State."

This Court has repeatedly rejected the suggestion that the breadth of state sovereign immunity is limited to the Eleventh Amendment's modest jurisdictional corrective. In contrast with the Amendment's limited ambit, the doctrine of sovereign immunity ensures that "[w]ithout [a State's] consent it cannot be sued in any court, by any person, for any cause of action whatever." *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911) (emphasis added). Thus, while the Amendment makes no mention of suits brought against a State by its own citizens, the Court resolved a century ago that such suits nevertheless could not be maintained in the face of a valid claim of state sovereign immunity. *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890). In so holding, the Court emphatically rejected the notion that the jurisdictional provisions of Article III and the corresponding limitations of the Eleventh Amendment are the only constraints on a State's amenability to suit in federal court. Since *Hans*, the Court has had occasion to reaffirm that state sovereign immunity (and not the Eleventh Amendment) bars most suits against States in federal court. *E.g.*, *Smith v. Reeves*, 178 U.S. 436, 447-449 (1900) (barring suit by federally chartered corporations); *Monaco v. Mississippi*, 292 U.S. 313, 329-330 (1934) (barring suit by foreign nations).

troversies * * * between a State and Citizens of another State" would not provide a mechanism for making States unwilling defendants in federal court. The Court in *Chisholm*, however, considered the plain meaning of the constitutional provision to be controlling. The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally, to restore the original understanding * * *.

The Court has long explained such decisions as guided by "postulates" far more expansive than the literal sweep of the Amendment:

Manifestly, we cannot rest with a mere literal application of the words of section 2 of article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a "surrender of this immunity in the plan of the convention."

Monaco, 292 U.S. at 322-323, quoting *The Federalist* No. 81, at 487 (A. Hamilton). It has more recently been affirmed that the doctrine of state sovereign immunity "was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2297 (1989) (Scalia, J., concurring in part and dissenting in part). See *Welch*, 483 U.S. at 487 ("The contours of state sovereign immunity are determined" not by the Eleventh Amendment, but "by the structure and requirements of the federal system"); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984) (applying "the fundamental principle of sovereign immunity").

B. In ratifying the Constitution and agreeing to come together as a Union, the States surrendered a portion of their sovereignty to the larger confederation. This Court's cases have recognized that this surrender included some portion of the States' historic immunity from suit—limited, however, to what "the plan of the convention" required. *Monaco*, 292 U.S. at 323. The circumstances

in which the constitutional plan requires that an exception be made to the rule of state sovereign immunity are both narrow and rare, and in fact have been limited to two contexts.

1. First, the concept of a new and workable Union of States required that each sovereign in the confederation be subject to suit by superior and coequal sovereigns. Thus, the Court has recognized as implicit in the constitutional scheme that the United States may sue States in federal court, for absent this authority "the permanence of the Union might be endangered." *Monaco*, 292 U.S. at 329, quoting *United States v. Texas*, 143 U.S. 621, 645 (1892). It is likewise inherent in the constitutional arrangement that States may sue other States in a federal forum because "[t]he establishment of a permanent tribunal with adequate authority to determine controversies between the States * * * was essential to the peace of the Union." *Monaco*, 292 U.S. at 328.

The former limitation on state sovereign immunity reflects the supremacy of the United States under the federal system and its obligation to preserve the stability of the Union. The latter confirms the coequal status of the sister States and the need for a forum to resolve disputes among charter members of the new Nation. In both cases, this Court long ago settled that the States, "by their own consent and delegated authority" (*Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838)), acceded to the jurisdiction of the federal courts as a necessary corollary to their participation in the Union. See *Texas*, 143 U.S. at 639 ("The necessity for the creation of some tribunal for the settlement of * * * controversies that might arise [between States], under the new government to be formed, must * * * have been perceived by the framers of the Constitution * * *").⁶

⁶ The Court has likewise deemed "inherent in the constitutional plan" its appellate jurisdiction over cases initiated in state court

2. Second, Congress is empowered in certain circumstances to subject States to suit in federal court. It has been settled for some time that state sovereign immunity necessarily gives way where Congress expressly subjects the States to suit in federal court pursuant to the enforcement provisions of Section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). And in *Pennsylvania v. Union Gas*, a majority of this Court confirmed dicta in prior cases that Congress may subject States to suit in federal court when acting pursuant to the Commerce Clause. 109 S. Ct. at 2281-2286 (plurality opinion); *id.* at 2295 (White, J., concurring in part). Cf. *Welch*, 483 U.S. at 475 (plurality opinion) (assuming "without deciding or intimating a view of the question" under Commerce Clause); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252 (1985) ("Assuming, without deciding" same point).

Although this principle, at least with respect to the Commerce Clause, is arguably not as logically compelled as the exceptions made for suits by the United States and sister States, it too may be said to be implicit in the constitutional plan: In ratifying the Constitution, the States expressly ceded substantive legislative power to the federal government and acknowledged that they were joining a Union in which federal law would be supreme. The ability of Congress to subject States to federal law followed naturally from this grant of power. Therefore, where Congress regards it as "necessary and proper" to do so, it presumably may create a cause of action against the States and provide for its presumptive enforcement in state courts or, where necessary, in the federal courts. See *Union Gas*, 109 S. Ct. at 2281-2286.

raising federal questions. *McKesson v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2245-2246 (1990), quoting *Monaco*, 292 U.S. at 329, citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821). See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816) ("it is plain that the framers of the constitution did contemplate" Supreme Court cognizance of suits arising in state court).

The significant concession by the States was thus in granting Congress the power to make substantive law and agreeing to render themselves subject to that law. Having conceded that much, it is arguably a matter of far less consequence whether such law is to be enforced through suit by the United States; by the United States "ex rel." a tribe or individual; or directly by an individual or tribe in its own name pursuant to congressional authorization.

Having ceded such legislative authority to Congress, however, the States may properly insist that Congress unmistakably manifest its intention to exercise such authority before they may be subjected to suit in federal court. Because congressional abrogation of state sovereign immunity may "upset[] 'the fundamental constitutional balance between the Federal Government and the States'" (*Dellmuth v. Muth*, 109 S. Ct. 2397, 2400 (1989), quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985)), this Court has concluded that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242. See also *Dellmuth*, 109 S. Ct. at 2401 ("evidence of congressional intent must be both unequivocal and textual"); *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818, 2824 (1989) (arguments "not based in the text of the statute * * * are not helpful" to abrogation analysis).

This requirement of a clear statutory directive abrogating immunity is itself implicit in the plan of the convention. To the extent the States can be said to have ceded "powers of abrogation" (*Dellmuth*, 109 S. Ct. at 2400) in entering into the Union, these powers were ceded to Congress, the only branch of the federal government in which the States as States are represented and which, therefore, may be expected to guard against casual encroachments on state sovereignty. For the judicial (or executive) branch to assume the power to abrogate state

sovereign immunity on its own, without clear and unambiguous direction from Congress, would involve an assertion of federal power not contemplated by the Framers and not subject to the political processes that serve to protect against unwarranted intrusion on state sovereignty.

3. As the foregoing confirms, the States retained sovereign immunity except to the extent that a *necessary* implication to the contrary inheres in the language and structure of the Constitution.⁶ Consistent with this principle, the Court has properly rejected attempts to find further implied divestitures of state sovereign immunity in the constitutional framework. It has thus been resolved that in ratifying the Constitution, the States nevertheless retained their immunity from suit brought by federally chartered corporations (*Smith v. Reeves*, 178 U.S. at 447-449); by foreign states (*Monaco*, 292 U.S. at 329-330); and by their own citizens (*Hans*, 134 U.S. at 20-21). Such lawsuits, whatever their potential virtues, have not been deemed so essential to the constitutional fabric as to support an assumption of state surrender of immunity. These cases evidence appropriate reluctance to find in the Constitution any surrender of sovereign immunity except as is necessary to preserve the survival of the Union.

C. Although the court below acknowledged that respondents' suit here came within neither of the narrow exceptions to the doctrine of state sovereign immunity identified above, it nevertheless concluded that the State

⁶ The Court has recognized that States may allow themselves to be sued in federal court by waiving *both* their sovereign immunity and their Eleventh Amendment immunity. See, e.g., *Welch*, 483 U.S. at 473-474; *Atascadero*, 473 U.S. at 238 n.1, 241; *Pennhurst*, 465 U.S. at 99 n.9. The idea of waiver as applied to a jurisdictional limitation, such as the Eleventh Amendment, has been characterized as "anomalous" (*Employees*, 411 U.S. at 294 n.10 (Marshall, J., concurring in the result)), as it surely is. In any event, no sufficient waiver of sovereign immunity from suit, much less Eleventh Amendment immunity from suit in federal court, has been shown in this case.

of Alaska was subject to suit in this case. The court reached this result based on a subjective and amorphous assessment of what it called "principles of federalism." Pet. App. B11. We submit that state sovereign immunity may not so easily be dislodged. Having concluded that Congress had not abrogated the State's immunity in 28 U.S.C. § 1362 (or any other statute) with the requisite "unmistakably clear" language, and it being plain that Indian tribes cannot claim the constitutional prerogatives of the United States or the several States (see Part II(C), *infra* at 21-25), the Ninth Circuit should have affirmed the dismissal of the complaint.

The appellate court's error, we submit, lay in its failure to appreciate the distinction between sovereign immunity and the jurisdictional bar posed by the Eleventh Amendment. Thus, the court began its analysis by juxtaposing the language of the Eleventh Amendment with this Court's decisions defining the circumstances under which a State may be subjected to suit in federal court. Unable to find a rationale for the Court's decisions in the "literal language of the Eleventh Amendment," the lower court concluded that this Court had "constructed a jurisprudence in respect to this amendment in which the Court's own gloss, the Court's own readings of the amendment's spirit and purpose are what count." Pet. App. B10. The court thus interpreted what it perceived to be departures from the language of the Amendment as inviting a wide-ranging policy analysis guided by "the 'principles of federalism' that inform the amendment" (Pet. App. B11), and proceeded to engage in such an analysis with respect to the issue at hand.

The Ninth Circuit's approach was misguided. This Court's precedents have never endorsed a policy debate of the sort embraced below. The precedents the lower court found difficult to explain were not cases construing the Eleventh Amendment, but instead were cases applying the principle of state sovereign immunity and its limited exceptions. Those cases affirm "the vital role of the

doctrine of sovereign immunity in our federal system." *Pennhurst*, 465 U.S. at 99.

II. THE STATE OF ALASKA RETAINS ITS SOVEREIGN IMMUNITY FROM SUIT BY INDIAN TRIBES.

The issue in this case is whether the respondent Native Villages may, consistent with the sovereign immunity principles outlined above, pursue their monetary grievances against the State of Alaska in federal court. The issue turns on whether Congress unmistakably manifested its intention to abrogate immunity with respect to suit by Indian tribes, and, if not, whether the States implicitly relinquished their immunity from such suits in the plan of the Constitution. We submit that the answer to both questions is no.

A. Congress Has Not Unmistakably Legislated To Subject States To Suit By Indian Tribes.

There is no question, as the court below acknowledged, that 28 U.S.C. § 1362 "does not unmistakably, unequivocally and textually abrogate the state's immunity" from suit by Indian tribes. Pet. App. B12. The language of Section 1362—providing federal jurisdiction over "all civil actions" brought by certain Indian tribes raising federal questions⁷—authorizes federal suit generally; it makes no mention of suits against States. As this Court has made clear, "[a] general authorization for suit in federal court"—such as Section 1362—"is not the kind of unequivocal statutory language sufficient to abrogate" state sovereign immunity. *Atascadero*, 473 U.S. at 246. See also *Welch*, 483 U.S. at 476. Indeed, the lan-

⁷ The full text of Section 1362 provides:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

guage of Section 1362 is practically indistinguishable from formulations that this Court has previously found not to constitute the clear evidence of legislative intent required to abrogate sovereign immunity. See *Atascadero*, 473 U.S. at 245-247 (Section 504 of Rehabilitation Act of 1973, providing for jurisdiction of "any action or proceeding to enforce" the Act, does not evidence clear abrogation of sovereign immunity); *Dellmuth*, 109 S. Ct. at 2400, 2402 (Education of the Handicapped Act, permitting aggrieved parties to bring "a civil action * * * in a district court of the United States," "in no way intimates that the States' sovereign immunity is abrogated").⁸

Certain lower courts have relied on this Court's decision in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), to conclude that Section 1362 abrogates state sovereign immunity.⁹ *Moe* said no such thing. *Moe* stands only for the proposition that the Tax Injunction Act, 28 U.S.C. § 1341, does not bar suits by Indian tribes seeking to enjoin state tax schemes. 425 U.S. at 467-469. Courts divining broader meaning in *Moe* make too much of the Court's suggestion there, "[l]ooking to the legislative history," that Section 1362 "contemplated that a tribe's access to federal court to litigate * * * would be at least in some respects as broad as that of the United States suing as the tribe's trustee." *Id.* at 472-473 (emphasis added). As the italicized language makes clear, *Moe* did not equate the prerogatives of the United States with those of Indian tribes with respect to all issues posed by a suit against a State in federal court.

⁸ Like Section 1362, the other federal statutes pertaining to Indian affairs referenced by respondents below (Pet. App. B8-B9) are silent on the issue of state amenability to suit and add nothing to the present analysis.

⁹ See, e.g., *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1080 (2d Cir. 1982); *Red Lake Band of Chippewas v. City of Baudette*, 730 F. Supp. 972, 981-982 (D. Minn. 1990) (collecting case law); *Lac Courte Oreilles Band v. Wisconsin*, 595 F. Supp. 1077, 1079-1080 (W.D. Wis. 1984).

Even were *Moe* at one time susceptible to such a reading, this Court's more recent cases have made clear that abrogation language must be unequivocal and that "arguments [that] are not based in the text of the statute * * * are not helpful in determining whether the command of *Atascadero* [requiring unmistakably clear abrogation language] is satisfied." *Hoffman*, 109 S. Ct. at 2824. See also *Dellmuth*, 109 S. Ct. at 2401 ("[l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment"). These decisions effectively foreclose overbroad interpretations of *Moe*.

Had Congress intended to abrogate the States' immunity from suit by Indian tribes when enacting Section 1362, it could easily have included appropriately "unmistakable" language in the text. See, e.g., *Union Gas*, 109 S. Ct. at 2278 (noting CERCLA's "explicit recognition of the potential liability of States under this statute"); 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of" enumerated provisions of the Rehabilitation Act of 1973). That Congress chose not to so express itself, even in the wake of this Court's decisions requiring an unequivocal statutory directive, is dispositive.

B. Neither The Indian Commerce Clause, Nor Any Other Constitutional Provision, Of Its Own Force Abrogates State Sovereign Immunity.

Despite the absence of any statement from Congress ("unmistakable" or otherwise) expressing an intention to subject States to suit by Indian tribes, the court of appeals nevertheless concluded that respondents could maintain their suit for monetary relief against the State of Alaska. The court reasoned in part that the Indian Commerce Clause, Art. I, § 8, cl. 3,¹⁰ "constitutes consent

¹⁰ "Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

by the states to federal jurisdiction," and that Indian tribes can therefore sue States in federal court. Pet. App. B13.

We are aware of no authority for the proposition that the Indian Commerce Clause of its own force abrogates state sovereign immunity. This Court has never, for instance, held or intimated that the Fourteenth Amendment of its own force effects a waiver of state sovereign immunity; it has determined, rather, that Congress may legislate pursuant to its power under the Fourteenth Amendment to override such immunity. E.g., *Dellmuth*, 109 S. Ct. at 2400 ("Congress, acting in the exercise of its enforcement authority under § 5 of the Fourteenth Amendment, may abrogate the States' Eleventh Amendment immunity"). Likewise, the mere fact that Congress has expansive powers under the Commerce Clause does not *by itself* render the States amenable to suit in federal court. Rather, Congress must exercise its authority to abrogate through legislation. See *Union Gas*, 109 S. Ct. at 2282 ("Congress has the power to abrogate immunity when exercising its plenary authority to regulate interstate commerce"); *Hoffman*, 109 S. Ct. at 2827 (Marshall, J., dissenting) (same).

The court of appeals' analysis of the Indian Commerce Clause was thus flawed in two respects. First, the court overlooked that the mere fact that the States have ceded certain substantive legislative authority to Congress does not automatically render the States amenable to the jurisdiction of the federal courts in suits arising under exercises of that legislative authority. The issues are distinct. In attributing self-abrogating force to the Indian Commerce Clause, the lower court confused Congress's power to abrogate immunity with an appropriate exercise of that power. As such, the court of appeals rendered superfluous this Court's requirement that Congress express its intention to abrogate state sovereign immunity in unmistakable statutory language.¹¹

¹¹ There is nothing about the Indian Commerce Clause that would warrant a different test. The Clause was added to the Constitution

Second, there is no textual or other basis for the proposition that, of all the powers granted to Congress under Article I, *only* the Indian Commerce Clause effects an automatic waiver of state sovereign immunity irrespective of congressional action. That Congress exercises plenary authority over Indian affairs does not change this analysis. Congress's power under the Bankruptcy Clause is at least as comprehensive (if not more so) as its power under the Indian Commerce Clause; yet the Court has refused to find abrogation of state sovereign immunity as to bankruptcy matters absent an "unmistakably clear" statement abrogating such immunity in the language of the federal bankruptcy statutes. *Hoffman*, 109 S. Ct. at 2822-2824. Likewise, the federal government's plenary authority over relations with foreign nations is surely as broad as any other; once again, however, the States retain their immunity from suit brought by foreign sovereigns. See *Monaco*, 292 U.S. at 330-332 (recognizing States' retention of immunity from suit despite "sovereign prerogative" of the United States over international affairs and the "National government[']s control * * * over our foreign relations"). There is no warrant, therefore, for the lower court's expansive interpretation of the Indian Commerce Clause.

to confirm that the newly created Congress would have authority to regulate trade with the Indian tribes. It embodies a recognition that "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). It was not, however, envisioned by the Framers or ever suggested by this Court that the Indian Commerce Clause was meant to have any broader significance. Accordingly, this Court has rejected overbroad interpretations of the Clause. See, e.g., *Washington v. Confederated Tribes*, 447 U.S. 134, 157 (1980) ("It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes"); *Moe*, 425 U.S. at 481 n.17 (rejecting notion that Commerce Clause provides an "automatic exemption[]" from taxation to Indian tribes).

C. In Ratifying the Constitution, States Did Not Implicitly Consent To Suit By Indian Tribes.

The foregoing confirms that neither the Indian Commerce Clause nor any federal statute provides a textual basis for holding States amenable to suit by Indian tribes. Thus, the sole remaining basis for authorizing such suit is the Ninth Circuit's assertion that the State of Alaska's "consent to federal jurisdiction" in such cases is "inherent in the plan of the Constitution." Pet. App. B18.¹²

This conclusion misconceives the status of the Indian tribes in the constitutional plan, on the one hand, and the strength of the evidence required to find implicit divestitures of sovereign immunity, on the other. As discussed above, it is both plausible and necessary to suppose that in forming a new Union, the States implicitly vested in the new federal government the authority to bring suit against States where necessary for the national good. It is likewise fair to conclude that in entering into a Union, the States recognized their sister States as coequals, and that disputes between them might be resolved in an impartial federal tribunal if peace among them was to be preserved.

No similar conclusion can be drawn with respect to Indian tribes. The status of Indian tribes in the constitutional plan has never been thought comparable to that

¹² As the court below acknowledged, this holding flatly contradicts this Court's observation, six decades ago, that "[t]he reason the Indians could not bring" suit against Minnesota for monetary relief "lies in the general immunity of the State and the United States from suit in the absence of consent." *United States v. Minnesota*, 270 U.S. 181, 195 (1926). See *ibid.* (treating "as fact" that Indians "could not sue the State"). Cf. *Arizona v. California*, 460 U.S. 605, 614 (1983) (assuming "that a State may interpose its immunity to bar a suit brought against it by an Indian tribe"). That the Court has never in the years since *Minnesota* been forced to reconsider these comments suggests the novelty of the Ninth Circuit's conclusion that the States "consented" to suit by Indians when they ratified the Constitution.

of the United States or the States. The Indian tribes are not superior sovereigns, like the United States. And the tribes are not coequals, like sister States, in the constitutional scheme. The Indian tribes retain their sovereignty only at the sufferance of the Union. See *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). The tribes were not parties to the debates leading to ratification of the constitutional plan, were not necessary signatories to that plan, and cannot be equated with the United States or the States for immunity purposes.

The court of appeals' conclusion also cannot be squared with the relationship among the United States, the States, and the Indian tribes as it was understood to exist at the time that the Constitution was conceived. In ceding plenary authority over Indian affairs to the federal government, the States acknowledged the need to address matters pertaining to Indian tribes on a national scale.¹³ It was with the blessing of the States, therefore, that Indian tribes came "completely under the sovereignty and dominion of the United States." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). What emerged was a trust relationship between the new Nation and the Indian tribes "unlike that of any other two people in existence." *Id.* at 16. Pursuant to this relationship, Indians were to "look to our [federal] government for

¹³ Thus, Hamilton observed that the danger posed by neighboring Indian tribes, like that posed by foreign nations, "is common" to all States; that "the means of guarding against" this danger "ought in like manner to be the objects of common councils, and of a common treasury"; and that requiring each State to fend for itself vis-a-vis Indian tribes "would neither be equitable as it respected" those States particularly exposed, "nor safe as it respected the other States." *The Federalist* No. 25, at 163. The Framers considered it equally vital that the national government have "the sole and exclusive right of regulating the trade" with Indian tribes (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)), and principal responsibility for "preventing their exploitation" as to land claims (*Heckman v. United States*, 224 U.S. 413, 433 (1912)).

protection; rely upon its kindness and its power; [and] appeal to it for relief to their wants." *Id.* at 17. For its part, the United States acquired "special trust obligations requiring [it] to adhere strictly to fiduciary standards in its dealings with Indians." F. Cohen, *Handbook of Federal Indian Law* 207 (1982). The United States discharged its trust obligations to the Indian tribes in large part through legislation and, until 1871, through its treaty-making powers.¹⁴ In addition, it was early on established (and more often simply assumed) that the United States could sue in federal court to vindicate Indian interests. See *Minnesota*, 270 U.S. at 194 (noting the United States' "right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations" toward Indian tribes.) See also *Heckman v. United States*, 224 U.S. 413, 439-444 (1912); *United States v. Rickert*, 188 U.S. 432, 444 (1903).

Whatever modern minds may think of this legacy, the Framers plainly envisioned the new Nation's relationship with the Indian tribes as that of a benign protectorate, "resembl[ing] that of a ward to his guardian." *Cherokee Nation*, 30 U.S. at 17. See also *Rickert*, 188 U.S. at 437 (it "has always been recognized by the Executive and by Congress, and by this court," that the Indians "are yet wards of the Nation, in a condition of pupillage or dependency, and have not been discharged from that condition"); *Heckman*, 224 U.S. at 437 ("[o]ut of [the Nation's] peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed"). From the perspective of the Framers, therefore, there would have been no more reason to envision Indian tribes commencing suit in federal court (much less suit against States) than to expect a ward to bring suit on his own behalf unaccompanied by his guardian.

¹⁴ In that year, Congress enacted legislation ending the process of treaty-making with the Indians. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as carried forward at 25 U.S.C. § 71).

Against this backdrop, we believe that the Framers would have thought remarkable the notion that in ratifying the Constitution the States were somehow consenting to private damages suit by Indian tribes.¹⁵ This is not to demean the sovereignty of the Indian tribes or to deny their special place in our system of government. It is rather to acknowledge that the status of the Indians, however unique, cannot fairly be equated with that of the States, or the United States, under the constitutional plan.

The conclusion that Indian tribes enjoy no inherent right to sue States in the federal courts does not, of course, leave the tribes without recourse against encroachment on their rights. The States may elect to waive their sovereign immunity, as they have done in other contexts. In addition, the United States retains its prerogative—indeed, its duty—to vindicate Indian rights, including, where necessary, through litigation on behalf of Indian tribes against States. And, as indicated

¹⁵ This proposition would have been unthinkable at a time when the status of Indians as citizens of the Union or the States was seriously doubted; when Indians could not directly bring suit in federal courts; and when it remained uncertain "[w]hat description of Indians are to be deemed members of a State." *The Federalist* No. 42, at 269 (J. Madison). Nothing in the colonial history, nor in the debates leading up to ratification of the Constitution, would have prepared the States for such an outcome. Indeed, the States would have been hard-pressed to comprehend the need for such a remedy when the United States was both empowered and obliged to legislate solutions to Indian dilemmas, to execute treaties with Indian tribes, and to bring suit on behalf of Indian tribes where necessary to promote Indian rights.

Nor would Indian suits against States have been considered by the Framers as "essential to the peace of the Union." *Monaco*, 292 U.S. at 328. Peace with the Indians was to be secured, and was in fact secured, through treaty-making with the United States, not private litigation with individual States. See, e.g., *Heckman*, 224 U.S. at 430 ("serious controversies" with the Eastern Cherokees were resolved by treaty). See generally F. Cohen, *supra*, at 62-107 (reviewing history of treaty-making with Indian tribes).

above, Congress may enact a federal right of action in favor of Indian tribes, provided it does so in unequivocal statutory language.¹⁶ That the States may not be further accountable to Indian tribes through private suits for monetary relief in federal court is, as with all other instances of state sovereign immunity, simply "a necessary consequence of * * * a system of dual sovereignties." *Welch*, 483 U.S. at 488.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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¹⁶ Moreover, the Eleventh Amendment does not bar Indian tribes—any more than it bars any other litigant—from seeking prospective declaratory and injunctive relief from States, as respondents in part seek here. See *Edelman v. Jordan*, 415 U.S. 651 (1974). Indian tribes may also sue state officials (*Ex parte Young*, 209 U.S. 123 (1908)) as well as local governments under 42 U.S.C. § 1983 (*Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978)).

DEC 17 1989

SPANIOL, JR.,
CLERK

In The
Supreme Court of the United States
October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF
COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioners,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,

Respondents.

On A Writ Of Certiorari To The Ninth Circuit
Court Of Appeals

BRIEF OF AMICI MICCOSUKEE TRIBE OF INDIANS OF
FLORIDA, OGLALA SIOUX TRIBE, ONEIDA TRIBE OF
INDIANS OF WISCONSIN, RED CLIFF BAND OF LAKE
SUPERIOR CHIPPEWA, ST. CROIX CHIPPEWA INDIANS
OF WISCONSIN, SEMINOLE TRIBE OF FLORIDA,
SISSETON-WAHPETON SIOUX TRIBE, and THREE
AFFILIATED TRIBES OF FT. BERTHOLD
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INTEREST OF AMICI

Amici are federally recognized Indian tribes occupying federal reservations in the states of Florida, North Dakota, South Dakota, and Wisconsin. Amici join respondents Native Village of Noatak and Circle Village urging affirmance of the Ninth Circuit decision.

Amici are generally representative of Indian tribes in the nature and quality of the relations between them and the states in which they reside. The Oneida Indian Tribe of Wisconsin, for example, has historical and as yet unresolved land claims against New York State and is presently engaged in negotiations with the State of Wisconsin regarding gaming, jurisdiction, and environmental issues. Amici Red Cliff Band of Lake Superior Chippewa Indians and St. Croix Chippewa Indians of Wisconsin are presently engaged in litigation against the State of Wisconsin involving past and on-going state violations of those tribes' treaty hunting, fishing, and gathering rights. Amicus Sisseton-Wahpeton Sioux Tribe has long-standing differences with the State of South Dakota over jurisdiction, taxation and other issues. Amicus Miccosukee Tribe of Indians of Florida has recently obtained state agreement to mediate claims arising out of state trespass on tribal trust lands. Other amici here have similar matters of concern under discussion with or litigation against states where they reside.

The suability of the various states by amici tribes is a matter of great moment in the conduct of relations on these important, governmental concerns. Without access to federal court to seek all remedies against states for

violation of the tribes' federally protected resources and governmental interests, the dynamic of the relationship between the amici tribes and the states would be dramatically altered. In the amici tribes' view, the result would be a serious erosion of tribal resources and autonomy. Amici tribes file this amici curiae brief for this reason. The brief is filed with consent of petitioners.

SUMMARY OF THE ARGUMENT

Subject matter jurisdiction over respondents' claims is a preliminary matter that must be addressed by this Court at the outset. Only if the Court finds subject matter jurisdiction over the claims need it reach the state sovereign immunity and other issues presented in the petition for certiorari. Amici tribes confine their argument here to the waiver of state sovereign immunity found in the plan of the convention.

The state sovereign immunity issue presented here requires the Court to consider for the first time the interplay between two principles basic to our federal system.¹

¹ Lower federal courts have generally held that the states' sovereign immunity to suit does not bar money damage claims by Indian tribes. See *Oneida Indian Nation of New York v. Oneida County*, 719 F.2d 525 (2nd Cir. 1983); *Cayuga Indian Nation of New York v. Cuomo*, 565 F.Supp. 1297 (N.D.N.Y. 1983); *Charrier v. Bell*, 547 F.Supp. 580 (M.D.La. 1982); *Confederated Tribe of Colville v. State of Washington*, 446 F.Supp. 1339 (E.D.Wash. 1978), *rev'd in part on other grounds*, 447 U.S. 104 (1980). However, petitioners insist that this Court's recent decisions on states' sovereign immunity in other contexts have

(Continued on following page)

The first such principle is the unique status of Indian tribes as governments subject in their external relations to the United States Constitution, but not parties to it. The second is the states' sovereign immunity from suit, confirmed by the Eleventh Amendment to the Constitution.² The precise question is whether a narrow exception to the second principle must be made in light of the first, thereby allowing Indian tribes to sue states for money damages in federal court.

This is not a question that can be resolved by facile characterizations of tribes as more like one government than another. As this Court has frequently observed, tribes are unlike any other government within our federal system. The matter requires careful examination of the

(Continued from previous page)

thrown these Indian law decisions into doubt. Petitioners' Br., p. 26 n. 18. In addition, petitioners suggest that the Court disposed of this issue in *United States v. Minnesota*, 270 U.S. 118 (1926). *Id.* at 17. This is plainly not so. The issue of suits by tribes against states was not before the Court there and was not briefed by the parties. The Court's passing statement on suits by Indians was more in the nature of an assumption for the purposes of argument than a reasoned analysis of the point. This is the Court's first opportunity to examine directly whether Indian tribes, because of their unique position in the federal system, can sue states for money damages in federal court.

² This Court considers the Eleventh Amendment to be merely an exemplification of the doctrine of state sovereign immunity, not an exhaustive statement of states' immunity from suit. *Welch v. Dept. of Highways & Public Transp.*, 483 U.S. 468, 472 (1987); *Pennhurst State Schools Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Thus, amici focus here on the doctrine of state sovereign immunity, not on the language and history of the Eleventh Amendment.

plan of the convention to determine whether there is in the federal structure created by the Constitution a surrender of states' immunity to suits by Indian tribes.

This examination shows that tribes have been consistently viewed and treated as governments that preceded and exist independently of the United States Constitution, but that are limited in the exercise of their inherent sovereign powers by the Constitution. Further, tribes have complex relationships with states within whose borders they reside, relationships that have historically been characterized by state transgression upon tribes' property and autonomy. The plan of the Union reflects this political reality by confirming the existence of exclusive sovereign authority for tribes and states within certain spheres, yet subjecting both to the supreme law of the land. Such a federal structure necessarily contains a surrender of states' immunity to suit by tribes. This result is an application of the well-established exception to state sovereign immunity in favor of independent governments, such as sister states and the United States, that co-exist in the federal framework.³

³ Amici tribes believe that the inquiry regarding tribes' ability to sue states is resolved by an examination of the plan of the convention, the states' immunity from tribal suits being necessarily surrendered therein. Respondents make additional arguments on this issue based upon 28 U.S.C. section 1362. See Respondents' Br., III, C. Amici tribes support those arguments as an independent basis for finding a waiver of the states' immunity to tribal suits and do not repeat them here.

ARGUMENT

BY CONSENTING TO A PLAN OF UNION THAT COMPREHENDS AND LIMITS INDIAN TRIBES, THE STATES WAIVED THEIR IMMUNITY TO SUIT BY TRIBES.

1. Governments that were created by or directly subject to the United States Constitution are not barred in making claims against states in federal court.

A fundamental purpose of state sovereign immunity was to protect states against private suits. In his oft-cited explication of state sovereign immunity, Hamilton carefully limited his discussion to private suits against states:

[T]here is no colour to pretend that the State governments, would by adoption of that [constitutional] plan, be divested of the privilege of paying their debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.

The Federalist, No. 81 (J.E. Cooke Ed. 1961). This Court, too, has emphasized the lack of coercive power in private claims for money against states in holding those claims barred by state sovereign immunity, indicating that the individual in these instances must rely on the good faith and honor of the state to perform its contractual and other obligations. See *Smith v. Reeves*, 178 U.S. 436, 446-8 (1900); *Hans v. Louisiana*, 134 U.S. 1 (1890), where the Court emphasized the private status of the would-be plaintiff.

This Court also relied heavily on the distinction between private suits and those filed by other sovereigns in holding that states are subject to suit by the United States and sister states. In *United States v. Texas*, 143 U.S. 621, 646 (1892), the Court observed that suability of states rests upon different grounds where the suit is among governments rather than one brought by an individual against a government and concluded:

The submission to judicial solution of controversies between these two governments [states and the United States], 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to objects committed to the other' [M'Culloch v. Maryland, 17 U.S. 4 Wheat 316, 400, 410] but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty.

See also *Monaco v. Mississippi*, 292 U.S. 313, 328 (1934) and *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), where the Court reached a similar conclusion regarding suits brought against states by a sister state. The very tranquillity and permanence of the Union might be endangered were such disputes not entrusted to the judiciary. *Monaco v. Mississippi*, 292 U.S. at 324-328.

This is not to say that every government has access to federal court to assert claims against states. The Court marked the limitations of the suit by governments exception to state sovereign immunity in *Monaco v. Mississippi*, *supra*. There, the Court held that state sovereign immunity barred suits by foreign governments against states. Foreign states, which are neither parties nor subject to the

federal structure of the Union, are not amenable to coercive jurisdiction demarcated in the Constitution and cannot invoke a waiver of state immunity found there. *Id.*

In *Monaco*, the Court had no occasion to consider whether there exist any governments in addition to sister states and the United States that, as participants in the federal structure, could find a waiver of state sovereign immunity in the plan of the convention. There is only one such group of governments that is likewise subject to the coercive authority of the Constitution – Indian tribes.

2. Indian tribes are governments limited by the United States Constitution, although not created by or parties to it.

This Court has frequently remarked upon the semi-sovereign status of Indian tribes. In *Holden v. Joy*, 84 U.S. 211, 242 (1872), for example, the Court described tribes as independent governments, though not foreign or states of the United States:

yet in a certain domestic sense and for certain municipal purposes, they are states, and have been uniformly so treated since the settlement of our country and throughout its history, and numerous treaties made with them recognize them as people capable of maintaining the relations of peace and war, of being responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community.

See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) and cases cited therein.

The plan of the convention reflects this view of tribes as governments. When drafting the Indian commerce clause, the delegates began with a modified version of the Indian clause of the Articles of Confederation⁴, which had vested Congress with authority over Indians "not members of any of the States." Art. IX, cl. 4, Articles of

⁴ The Committee on Detail's first draft constitution contained an enumeration of Congress' powers, but did not refer to Indian affairs. On August 18, Pinckney proposed that Congress be given other powers, including that "[t]o regulate affairs with the Indians, as well within as without the limits of the U.S." I Elliott's Debates on the Federal Convention 247 (Phil. 1836). These additional powers were referred to the committee which, in its second draft, included the following addition to the commerce clause: "and with Indians, within the limits of any State, not subject to the laws thereof." M. Farrand, II Records of the Federal Convention 367 (Yale U. Press 1937). On August 31, the Convention referred the second draft to the Committee of Eleven to consider parts of the constitution not yet acted upon by the Convention. IV Elliott's Debates on the Federal Convention 280. This committee simplified the language of the commerce clause to read "and with Indian tribes" in its September 4 report to the Convention. The committee's recommendation was adopted by the Convention that day. IV Elliott's Debates on the Federal Convention 283; II Records of the Federal Convention 493. When the Committee on Style reported out the final draft to the Convention, it had changed the semicolon that had preceded the Indian commerce clause into a comma. II Records of the Federal Convention 595. Thus, the convention began with a formulation very similar to the Articles of Confederation Indian commerce clause, but with the plain intent to broaden that power, eliminated the two limiting provisos that had appeared on it, and adopted the revised Indian Commerce clause with virtually no debate.

Confederation. This language was construed at the time to restrict Congress' authority to those Indians "who do not live within the body of the Society, or whose persons or property form no objects of its laws," [8 Papers of Madison 156 (R. Rutland, et al. eds.)], and to tribes considered "as independent nations," [F. Hough, Proceedings of the Commissioners of Indian Affairs, 21-22, Albany, 1861]. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1165 (2nd. Cir. 1987), *cert denied*, 110 S.Ct. 200 (1989).

This and another limiting proviso of the Articles of Confederation clause were eliminated by the convention⁵, thus delivering over to Congress greater authority over

⁵ Madison explained the changes made to the Articles' Indian commerce clause as follows: "The regulation of commerce with the Indian tribes is very properly unfettered from the two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of perplexity and contention in the Federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation is absolutely incomprehensible. This is not the only case in which the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with compleat sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain." *The Federalist*, No. 42.

Indian affairs. *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 668 (1974). The convention replaced the Articles' reference to "Indians not members of any of the States" with a reference to Indian tribes, thus carrying forward the restriction on Congress' authority in Indian affairs to those self-governing Indian communities capable of sustaining a government to government relationship. See *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

Plainly, Indian tribes are a governmental feature of the federal structure that is created by the Constitution, even though the tribes' powers as governments do not derive from the Constitution or the United States but are inherent. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978).⁶ And while the Constitution vests authority in the Congress to manage affairs with Indian tribes, complex relations among the tribes, states, and the United States do exist. The boundaries separating the three governments are not absolute; as citizens of the three mingle, so must authority among the three governments shift depending upon the context and relative interests at stake. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 884 (1986). Each is sovereign with respect to the

⁶ Indian tribes are the only other source of independent governmental power, in addition to states and the United States, that operate within the geographic confines of the United States. Counties, cities, territorial governments, indeed, all forms of local government with the exception of Indian tribes, exercise only those powers expressly delegated to them either by a state or the United States. *Wheeler*, *supra* at 320-22.

objects committed to it, yet all are subject to the supreme law of the land. See *United States v. Texas*, 143 U.S. at 646.

There are no provisions in the Constitution which directly or explicitly limit tribal powers, the tribes not being participants at the convention or signatories to the Constitution. *United States v. Wheeler*, *supra*; *Talton v. Mayes*, 163 U.S. 376, 384 (1896). Yet, this Court has indicated that, by virtue of their physical location within the geographic boundaries of the United States and states, Indian tribes are limited in their external relations, even on tribal territory, by the sovereign powers of those governments as defined in the Constitution.

The most elaborate explication of this doctrine is found in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). The precise question there was whether tribes could exercise criminal jurisdiction over non-Indians on the Indian reservations. In holding that tribes could not do so, the Court observed that there are limitations on tribal powers that stem from tribes' incorporation into the United States. These include the power to dispose of tribal land to whomever and under any circumstances they pleased [(*Oneida Indian Nation of New York v. Oneida*, 414 U.S. 661)] and the conduct of relations with foreign nations [(*Cherokee Nation v. Georgia*, 30 U.S.(5 Pet.) 1, 17-18 (1831))].

In *Oliphant*, the Court found a further limitation on tribes' external sovereignty emanating from the Bill of Rights. The Court described the "great solicitude that its [United States] citizens be protected by the United States from unwarranted intrusions on their personal liberty . . ." reflected in the adoption of the Bill of Rights. *Id.*

at 210. As a result, Indian tribes necessarily gave up their power to try non-Indian citizens of the United States by submitting to the overriding sovereignty of the United States. *Id.*; see also *Duro v. Reina*, 110 S.Ct. 2053 (1990), (tribes lack criminal jurisdiction over non-member Indians, even when the crime occurred on the tribe's territory); *Brendale v. Confederated Tribe and Bands of the Yakima Indian Nation*, 109 S.Ct. 2994 (1989) (tribes lack authority to regulate by zoning ordinance fee owned land on the reservation); and *Montana v. United States*, 450 U.S. 544 (1981), (tribes lack authority to regulate on-reservation hunting and fishing of non-members on fee lands).

Although not in the context of tribal suits against states, this Court has thus already addressed the basic inquiry in determining whether federal courts have jurisdiction over such suits. It has held Indian tribes to be independent governments that are subject to the Constitution in all their external relations, even though not parties to the Constitution, warranting a waiver of state sovereign immunity to tribal suits based upon the plan of the convention. *Cf. Smith v. Reeves, supra; United States v. Texas, supra*, (state immunity from private suits and state suability by the United States due to private or governmental status of the plaintiff). It has also held that state and federal coercive authority extends to tribal territory even though tribes retain limited powers of sovereignty, reflecting the complex and intense relationships among the three governments. *Cf. Monaco v. Mississippi, supra*, (state immunity to suit by foreign nations due to the absence of coercive authority in the federal system against foreign governments). As a consequence, Indian

tribes are inherently sovereign governments that are limited by and comprehended within the plan of the convention and are not barred in their claims against states.

3. That the plan of the convention must contemplate tribal suits against states is demonstrated by the history of state intrusion upon tribal property and autonomy.

In 1790, President Washington assured Chief Cornplanter of the Seneca Nation that Congress had, with enactment of the Indian Trade and Intercourse Act of July 22, 1790, 1 Stat. 137, provided a means whereby tribes could seek judicial redress for violation of tribal land rights by states and others:

Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States . . .

If . . . you have any just cause of complaint against [a purchaser] and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons.

4 American State Papers, Indian Affairs, Vol. 1, p. 142 (1832). President Washington plainly assumed that tribes could sue to protect their property rights and that such suits might be filed in federal court against states.⁷

⁷ Federal courts lacked federal question jurisdiction until 1875. See Judiciary Act of March 3, 1875, 18 Stat. 470. And the Supreme Court's original jurisdiction would not extend to suits by tribes, since tribes are neither states nor foreign countries.

(Continued on following page)

President Washington's statement was made against a historical background of state and tribal conflict over preservation of tribal resources, particularly land. This history of conflict has led this Court to observe that Indian tribes owe no allegiance to and receive no protection from the states in which they reside. To the contrary, the people of the states where tribes are found have often been those tribes' deadliest enemies. *United States v. Kagama*, 118 U.S. 375, 384 (1886). This history of conflict also supports an exception to states' sovereign immunity for suits by Indian tribes in the interest of creating and preserving a more perfect Union. *Monaco v. Mississippi*, 292 U.S. at 328; *United States v. Texas*, 143 U.S. at 644-45.

The earliest conflicts between tribes and states occurred with regard to tribal lands, lands that had been guaranteed to the tribes in federal treaties.⁸ Typically, the treaties demarcated tribal territory and non-Indian

(Continued from previous page)

Cherokee Nation v. Georgia, *supra*. However, tribal plaintiffs could and did sue in state court before the federal courts acquired federal question jurisdiction. See *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 255 n.1 (1985) (J. Stevens, dissenting).

⁸ These competing interests were the principal sources of controversy over Indian affairs during debate of the Articles of Confederation. The so-called landed states, i.e., those that claimed expansive western territories, were very jealous of their title to Indian lands, a title interest that vested only when the tribes' title thereto had been extinguished by treaty. The ambiguous limitations on the Indian commerce clause of the Articles of Confederation were adopted in an effort to achieve consensus on this point. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-59 (1832); *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145.

settlement on tribal lands was prohibited. These provisions were necessary in Congress' view to halt state sponsored trespass and settlement upon tribal lands. As Congress stated in its directions to the southern federal treaty commissioners:

The great source of contention between the said states and the Indian tribes being boundaries, you will carefully inquire into and ascertain the boundaries claimed by the respective states. And although Congress are of opinion that they might constitutionally fix the bounds between any state and an independent tribe of Indians, yet unwilling to have a difference subsist between the general government and that of the individual states, they wish you so to conduct the matter, that the states may not conceive their legislative rights in any manner infringed;

XXXIII Journals of the Continental Congress 706-07, October 25, 1787.⁹ Three states - Georgia, New York, and North Carolina, took particular umbrage at federal efforts to protect tribes in the possession of their lands.

Georgia simply ignored the federal treaties guaranteeing Creek territory and treated directly with

⁹ See Treaty of Fort Stanwix with the Six Nations, 7 Stat. 15, October 22, 1784; Treaty with the Wyandots and Others, 7 Stat. 16, January 21, 1785; Treaty of Hopewell with Cherokee, 7 Stat. 18, November 28, 1785; Treaty of Hopewell with Choctaw, 7 Stat. 21, January 3, 1786; Treaty of Hopewell with Chickasaw, 7 Stat. 24, January 10, 1786; Treaty with the Shawnee, 7 Stat. 26, January 31, 1786.

individual Creeks to acquire those lands.¹⁰ Congress' alarm at Georgia's actions was so great that in 1785, Georgia congressman William Houston wrote the Governor: "that the whole body of Congress is become so clamorous against our state that I shudder for the consequences . . . it is very seriously talked of, either to make a trial of voting Georgia out of the Union or to fall upon some means of taking coercive measure against her." III Documentary History of the Ratification of the Constitution 205. While less direct in their actions, New York and North Carolina similarly disputed federal authority to conclude treaties with tribes that guaranteed them possession of land within state borders.¹¹

¹⁰ Georgia adopted and acted upon a blatant policy of dispossessing the Creek Nation of its lands, notwithstanding federal treaties and policy to the contrary. State representatives negotiated so-called treaties with individual Creeks and took immediate steps to establish state jurisdiction over those lands. Counties were created in the territory and the area was opened for settlement. The Creek Nation violently objected to these pretended purchases and the intrusions upon their territory, threatening war. It is commonly assumed that Georgia ratified the Constitution quickly because of the mounting threat of war with the Creeks and the state's need for defensive aid from an effective general government. III Documentary History of the Ratification of the Constitution, State Historical Society of Wisconsin (1978), p. 205.

¹¹ New York unsuccessfully attempted to thwart federal negotiations with the Six Nations at Fort Stanwix. And North Carolina asked Congress to disavow its treaties with the Cherokees and Chickasaws insofar as they secured tribal lands within the state; the Congress refused. Neither state made any

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Toward the end of the confederation period, Secretary of War Knox made a series of anxious reports to Congress on state violations of federal treaties and Congress' standing committee on Indian affairs made several recommendations for resolving the impasse. See generally, *American Indian Policy in the Formative Years*, p. 32-40. Yet, the Continental Congress was unable or unwilling to take effective action, due in part to its limited coercive power and in part to its interest in maintaining good relations with the states for other purposes. See M. Farrand, *The Framing of the Constitution of the United States*, (Yale U. Press 1913) sections 29-31; *Oneida Indian Nation of New York v. State of New York*, 860 F.2d at 1157-60.

Sadly, state sponsored incursions on tribal resources and governmental rights have continued, as has the need for means of redress. The Oneida land claim cases, considered twice by this Court and in which amicus Oneida Indian Tribe of Wisconsin is a party, are an example. The record there shows that new York State repeatedly dispossessed the Oneidas of portions of tribal land in knowing violation of federal law. See *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661; *Oneida v. Oneida Indian Nation*, 470 U.S. 226. See also, *Worcester v. Georgia*, 31 U.S. 515, state violation of tribe's jurisdictional autonomy; *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. State of Wisconsin, et al.*, 653 F.Supp. 1420 (W.D. Wis. 1987) (in which amici Red Cliff Band of Lake

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effort to restrain non-Indian intrusions on tribal land and tensions mounted, as in Georgia. F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834* (1962), p. 33-37.

Superior Chippewa and St. Croix Chippewa Indians of Wisconsin are parties), state abridgement of tribes' treaty based fishing, hunting, and gathering rights.¹²

Here, even more so than in suits between states, the creation and preservation of a more perfect Union compel state susceptibility to suit by Indian tribes. State/tribal conflicts were direct and potentially violent at the time of the federal convention. The delegates were aware of these conflicts and sought to provide tribes some effective means of redress against states other than resort to war. See e.g., *The Federalist* No. 3, where Jay argued in support of a general restraining power:

because such violences are more frequently caused by the passions and interests of a part than of the whole, of one or two States than of the Union. Not a single Indian war has yet been occasioned by aggressions of the present Federal Government, feeble as it is, but there are several instances of Indian hostilities having been provoked by the improper conduct of individual

¹² In all these cases, the United States could have and arguably should have sued on the tribes' behalf to protect trust property. However, the Secretary of the Interior has wide discretion in determining when to institute legal proceedings on behalf of tribes. *Creek Nation v. United States*, 318 U.S. 629, 639 (1943). This discretion has been exercised in favor of litigation on tribes' behalf more or less sparingly over the course of the tribal/federal relationship, depending on prevailing political and other factors. See, e.g., Congress' reluctance to take firm steps to protect the southern tribes in the possession of their treaty-protected territory in 1785. See p. 15, *supra*. This Court has indicated, however, that tribes have a general legal right to sue themselves that is not foreclosed by the United States' ability to sue on behalf of tribes. *Creek Nation*, 318 U.S. at 640.

States, who are either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants.

See also Madison's comments on the New Jersey plan considered by the convention:

Will it prevent encroachments on federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic ancient and modern. By the federal authorities, transactions with the Indians appertain to Cong. Yet in several instances, the States have entered into treaties and wars with them.

I Records of the Federal Convention 316. Given this historical background, the federal structure that emerged from the convention must have allowed for suits by tribes against states. See *Monaco v. Mississippi*, 292 U.S. at 329.

The state amici attempt to resist the force of these historical circumstances by observing that inasmuch as tribes are immune from suits by states, states must likewise be immune from suits by tribes. Amici States' Br., p. 20. Their argument on this score both assumes too much and proves too little.

First, the amici argument on reciprocal immunity between tribes and states wrongly assumes that those two entities are legal equivalents. That is not the case. States are direct participants in the Constitution, while tribes are not. States enjoy reserved powers under the Constitution, while tribes do not. Because of the basic differences in form, origin, and authority, logic does not compel that tribes be treated as the legal equivalent of states.

Second, reciprocal immunity between tribes and states does not exist, regardless of whether tribes can sue states directly. It is indisputable that the United States can, and oftentimes does, sue states on behalf of Indian tribes, without a reciprocal right on the part of states to sue the United States on tribal matters. Thus, the sovereign immunity of states in their relations with Indian tribes has already been pierced, so that less is at stake when the only question is whether tribes can sue states without the United States as co-plaintiff.

Third, and most importantly, states have access to political means to set right any imbalance in state/tribal relations, while tribes do not. States are represented directly in the Congress and can obtain there a statutory waiver of tribes' immunity from suit. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Tribes on the other hand have no direct representation in the Congress and thus lack the political means to obtain a statutory waiver of the states' immunity from suit. As a consequence, tribes and states have grossly unequal ability to obtain political redress for grievances so that mutual immunity from suit should not be expected.¹³

¹³ States' ability to obtain federal legislation adjusting their relationship with tribes is a formidable and effective check on tribal authority. In 1953, for example, certain states convinced Congress to delegate to them civil and criminal jurisdiction over Indian lands located within their borders, even without the consent of the tribes affected. See Public Law 280, Act of August 15, 1953, 67 Stat. 588. Tribes objected to Congress' failure to require tribal consent to state assumption of jurisdiction, but the statute was not amended to require such

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CONCLUSION

Indian tribes are governments that feature in the federal structure, but have been invested with no indefeasible powers by the Constitution. Indian tribes also reside within the confines of states and the United States, with whom tribes of necessity have complex and oftentimes contentious relations. The maintenance of justice and of peaceful relations between state and tribal governments, and thus the preservation of the Union as reflected in the plan of the convention, requires that tribes are able to sue states in federal court.

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consent until 1968. See Act of April 11, 1968, 82 Stat. 73, 78-79. More recently and also over tribes' objection, states obtained federal legislation limiting tribes' right to conduct gaming operations on tribal lands free of state restrictions. Compare *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), with the Indian Gaming Regulatory Act of October 17, 1988, 102 Stat. 2467. Of course, the states' political wherewithal to obtain redress against tribes is a feature of the plan of the Union, just as is tribes' ability to obtain judicial redress against states.

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No. 89-1782

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,
Respondents.

On Writ of Certiorari To The United States
Court of Appeals For The Ninth Circuit

**BRIEF AMICUS CURIAE ON BEHALF OF
THE METLAKATLA INDIAN COMMUNITY
IN SUPPORT OF RESPONDENTS**

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IN THE
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No. 89-1782

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
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v. *Petitioner,*

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Respondents.

On Writ of Certiorari To The United States
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BRIEF AMICUS CURIAE ON BEHALF OF
THE METLAKATLA INDIAN COMMUNITY
IN SUPPORT OF RESPONDENTS

Amicus Metlakatla Indian Community ("the Community" or "the Tribe") submits this brief because this Court's decision in this case could vitally affect the Tribe's sovereign governmental authority and that of other tribes in Alaska. We urge the Supreme Court to uphold the Ninth Circuit's decision below.

INTEREST OF AMICUS CURIAE

Amicus Metlakatla Indian Community is a federally recognized tribe exercising jurisdiction over the Annette Islands Reserve in Southeast Alaska. This reservation was established by Congress for "the use of the Metlakahtla Indians, and those people known as the Metlakahtlans who,

on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaska Natives as may join them." Act of March 3, 1891, 26 Stat. 1101, 25 U.S.C. § 495.¹ The Tribe governs itself under a Constitution and By-laws approved on August 23, 1944, by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. The Tribe has a strong interest in the preservation of tribal access to federal courts to redress state wrongs, and in the continued recognition of its own status as a governing body of a federal Indian reservation in Alaska.

The Tribe shares its status as an IRA-organized Indian tribe with many other Alaska Native villages but with the distinction that it occupies the only federal Indian reservation, the Annette Islands Reserve, within the State of Alaska. The reservation status of the reserve was expressly preserved by section 19 of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1618.²

¹ In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918), this Court stated the reasons for the establishment of Annette Islands Reserve:

"The purpose of creating the reservation was to encourage, assist, and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining, and advance to the ways of civilized life."

² Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 19(a), 85 Stat. 688, 710 (1971) (current version at 43 U.S.C. § 1618(a) (1982)) states:

"Notwithstanding any other provision of law, and except where inconsistent with the provisions of this Act, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under the Act of May 31, 1938 (52 Stat. 593), are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Islands Reserve established by the Act of March 3, 1891 (26 Stat. 1101) and no person enrolled in the Metlakatla Indian Community of the Annette Islands Reserve shall be eligible for benefits under this Act."

The Community's tribal status has been recognized and confirmed by Congress, the Executive, and the Judiciary.³

As with respondents and other tribal amici, the State in its distribution of state assistance funds has failed to properly accord tribal status to the Tribe. The Tribe receives payments under the Revenue Sharing Program, Alaska Stat. §§ 29.89.010 and 29.89.050 (1984)⁴ and the Municipal Assistance Program, Alaska Stat. § 43.20.016 (1984).⁵ Under the Municipal Assistance Program the

³ For Congressional recognition see, e.g., 25 U.S.C. §§ 450-450n, 25 U.S.C. § 495. For Executive recognition see 25 U.S.C. § 476; 25 C.F.R. §§ 81.1-81.24 (1990). For judicial recognition see *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). See also *Atkinson v. Huldane*, 569 P.2d 151 (Alaska 1977). As to other Alaska Native tribes, see *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 at 273, 275, 279, 282, 285, 286 (1955) (noting at various points the tribal status of the Tlingit Indians generally and the Tee-Hit-Ton Band in particular); accord *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452, 455-456 (Ct. Cl. 1959); *Chilkat Indian Village v. Johnson*, — F. Supp. —, No. J84-024 Civil (D. Alaska Oct. 9, 1990) (amicus Chilkat Indian Village held to be a tribe because of history of Congressional and Executive recognition under IRA and ANCSA and adjudication of clan property remanded to tribal court for decision).

⁴ Alaska Stat. §§ 29.89.010 and 29.89.050 are currently codified at Alaska Stat. §§ 29.60.100 and 29.60.140 (1990), respectively. They have been modified to include communities without Native village governments.

⁵ The Community became eligible for participation in the Municipal Assistance Program in 1985 upon passage of 1985 Alaska Sess. Laws ch. 90. Chapter 90 contained amendments to Alaska Stat. § 43.20.016 expanding the definition of a municipality to include "a municipality organized under the federal law as an Indian reserve that existed before enactment of 43 U.S.C. § 1618(a) and is continued in existence under that subsection." At the same time, the State enacted legislation transferring the substance of Alaska Stat. § 43.20.016 to Alaska Stat. §§ 29.60.350-375 (1990), where the Municipal Assistance Program is currently codified. 1985 Alaska Sess. Laws ch. 74.

State authorized payments to the Community provided that it first establish a community development corporation to receive and administer the assistance funds. The State imposed two additional requirements: first, the development corporation's board of directors was to be determined in an election open to both member and non-member residents of the Reservation, and, second, the Community was to deliver a waiver of sovereign immunity against State actions to recover any of the assistance funds. Alaska Stat. § 43.20.016(e). These actions are inconsistent with the Community's status as a federally recognized tribe. The State's insistence upon a board whose membership is open to election by non-members with the authority to determine how the assistance funds are distributed has diluted the Tribe's governmental authority over the Annette Islands Reserve as established by federal law.

In the decision below, the Ninth Circuit Court of Appeals found that those Alaska Native villages which are listed in ANCSA or which are organized under section 16 of the IRA, 25 U.S.C. § 476, are federally recognized tribes and, as such, may sue the State of Alaska under 28 U.S.C. § 1362. Amicus Metlakatla Indian Community, which is organized under the IRA, respectfully supports that decision.

SUMMARY OF ARGUMENT

Tribal status is a political question. Once a Congressional or Executive determination of tribal status has been made, that determination is binding upon the courts. *United States v. Holliday*, 70 U.S. (3 Wall) 407, 419 (1866). Congress and the Executive have recognized the tribal status of those Alaska Native communities that have reorganized under the IRA, 25 U.S.C. § 476, or are defined as tribes in other federal legislation. Thus, the Court should also find that these communities are "tribes" within the meaning of 28 U.S.C. § 1362.

ARGUMENT

The issue of tribal status demands that we recognize the political existence of this country's native peoples. In Alaska alone, the Indian, Aleut, and Eskimo peoples comprise over 200 self-governing Native American communities.⁶ Indicative of the cultural diversity among the Alaska Native population is the presence of twenty spoken Native languages.⁷ The existence of such cultural diversity is an extraordinary, yet mostly unrecognized, asset. In order to preserve the integrity and existence of this country's Alaska Native communities, the courts must recognize their tribal status.

I. TRIBAL STATUS IS A POLITICAL QUESTION.

The tribal status of Alaska Native villages, generally, is clear. Congress and the Executive have historically recognized tribes in a variety of ways, including treaties, statutes, agreements, executive orders, appropriations, and administrative action. Since the determination of tribal status is a political question, Congressional or Executive recognition is binding upon the courts. *United States v. Holliday*, 70 U.S. (3 Wall) 407, 419 (1866).⁸ The political branches have frequently recognized the

⁶ See Secretary of Interior's list of Indian tribes recognized and receiving services from the Bureau of Indian Affairs, 51 Fed. Reg. 25,115 (1986); 53 Fed. Reg. 52,829 (1988).

⁷ Kiskien, *The Uncertain Legal Status of Alaska Natives After Native Village of Stevens v. Alaska Management & Planning: Exposing the Fallacious Distinctions Between Alaska Natives and Lower 48 Indians*, 31 Ariz. L. Rev. 405, 408 (1989).

⁸ In *United States v. Sandoval*, 231 U.S. 28, 46 (1913), this Court suggested that the only limitation upon Congressional or Executive authority to recognize tribes is a prohibition against arbitrary recognition. See also F. Cohen, *Handbook of Federal Indian Law* 5 (1982). Note: Cohen's *Handbook* has undergone three editions—1942, 1953 and 1982. The 1942 edition is still frequently cited because it contains valuable commentary not repeated in the later editions. We cite both the 1942 and 1982 editions herein.

tribal status of Alaska Native villages in treaties, statutes, and administrative action.⁹ Therefore, this Court should recognize the tribal status of those Alaska Native villages already recognized by Congress and the Executive.¹⁰ The Ninth Circuit Court of Appeals has already

⁹ See, e.g., Article III of the 1867 Russian American Treaty of Cession, 15 Stat. 539 (1867) (providing that "the uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country"); ANCSA, 43 U.S.C. § 1602(c) (defining Native villages to include "any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title"); the Indian Reorganization Act, 25 U.S.C. § 473 (the term "tribal organization" includes "the recognized governing body of any Indian tribe, band, nation, pueblo, or other organized community, including a Native village (as defined in section 1602(c) of Title 43)"); the Indian Financing Act, 25 U.S.C. § 1452(c) (tribe defined to include "Native villages and Native groups . . . as defined in the Alaska Native Claims Settlement Act"); the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e) (Indian tribe defined to include "any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act"); the Indian Health Care Improvement Act, 25 U.S.C. § 1603(d) (Indian tribe defined to include "any Alaska Native village or group or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act"); the Indian Child Welfare Act, 25 U.S.C. § 1903(8) (Indian tribe defined to include "any Alaska Native village as defined in section 1602(c) of Title 43"); and publication by the Secretary of the Interior of lists of recognized tribes in the Federal Register under 25 C.F.R. § 83.6 in 40 Fed. Reg. 5,682 (Nov. 24, 1982), 50 Fed. Reg. 6,055 (Feb. 13, 1985), 51 Fed. Reg. 25,115 (July 10, 1986), and 53 Fed. Reg. 52,829 (Dec. 29, 1988). See also Cohen, *Handbook of Federal Indian Law* 67 (1942).

¹⁰ In *Montoya v. United States*, 180 U.S. 261, 266 (1901), this Court set forth criteria for the determination of the tribal status of those Indian or Alaska Native communities that had not been previously recognized by Congress or the Executive:

"By 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or

done so in both the case below and *Native Village of Venetie v. State of Alaska*, — F.2d — (9th Cir.), decided Nov. 6, 1990, Slip Op. 13,583.

II. REORGANIZATION UNDER THE IRA IS CONCLUSIVE AS TO TRIBAL STATUS.

Secretarial approval of a tribal constitution adopted pursuant to section 16 of the IRA, 25 U.S.C. § 476, constitutes federal recognition of tribal status. The Ninth Circuit, following this principle, identified two factors that are determinative of tribal status for purposes of 28 U.S.C. § 1362: (1) whether an Indian group has a governing body approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, or (2) whether an Indian group is listed as a Native village in ANCSA. *Village of Noatak v. Hoffman*, 896 F.2d 1157, 1160 (instant case); *Native Village of Venetie v. State of Alaska*, — F.2d — (9th Cir.),

government, and inhabiting a particular though sometimes ill-defined territory. . . ."

This definition has formed the basis for further recognition by the courts and the Executive. See *Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377-378 (1st Cir. 1975); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir.), cert. denied, 444 U.S. 866 (1979); *Village of Noatak v. Hoffman*, 896 F.2d 1157, 1160 (instant case); 25 C.F.R. § 83.7 (1990). Clearly, Alaska Native communities fit this definition. Alaska Natives inhabiting a particular village are members of the same or similar race; there is one form of government; and the village is in a particular locale. Even petitioner concedes, "most Alaska Native villages probably would qualify as tribes" under the criteria contained in case law or 25 C.F.R. § 83.7. Petitioner's brief at 8 and 36. On September 10, 1990, Governor Steve Cowper issued an administrative order declaring that the State will treat as a tribe any Alaskan Native group exhibiting the commonly understood attributes of a tribe as defined by the federal government. He wrote, "for example, we believe that the Native residents of a majority of communities listed as a Native village in the Alaska Native Claims Settlement Act (ANCSA) should be considered a tribe." Alaska Governor's Admin. Order No. 123, Sept. 10, 1990.

decided Nov. 6, 1990, Slip Op. 13,583. See also *Price v. Hawaii*, 764 F.2d 623, 626-627 (9th Cir. 1985), cert. denied, 474 U.S. 1055 (1986). Alaska Native communities which satisfy one or both of these criteria must be accorded tribal status. The Tribe has organized itself under section 16 of the IRA with a Constitution approved by the Secretary of the Interior under that Act and, therefore, has such tribal status.

The exercise of governmental powers is a basic tribal function. See F. Cohen, *Handbook of Federal Indian Law* at 271 (1942). An IRA constitution is the "written organizational framework of any tribe reorganized pursuant to a Federal statute for the exercise of governmental powers." 25 C.F.R. § 81.1(g) (1990). Thus, Indian and Alaska Native groups that exercise governmental functions pursuant to the adoption of IRA constitutions are properly considered tribes.¹¹ Cohen writes that where, "the Indians of a given reservation organize and adopt a constitution under sec. 16, it has been administratively held that they thereby become a tribe." Cohen, *Handbook of Federal Indian Law* at 271 (1942). Therefore, this Court must recognize the Tribe's tribal status since the Tribe has chosen to exercise rights of self-government through the adoption of a constitution under section 16 of the IRA, the Executive branch has approved such exercise. The Tribe's assumption of governmental powers is seen in the following provisions of

¹¹ Perhaps the State's refusal to recognize the tribal status of Alaska Native communities is related to its inability to recognize the communities' traditional powers of self-government. A 1986 Governor's task force report acknowledged that the emotional nature of Alaska Native sovereignty "has impeded the ability of policymakers in the executive and legislative branches of state government to develop and implement a coherent policy on Native sovereignty. And until such a time as they acquire a clear and concise understanding of the facts and law relating to Native sovereignty, it is unlikely that they will be able to do so." *Governor's Task Force, Report on Federal-State-Tribal Relations Submitted To Governor Bill Sheffield*, 3 (1986).

the Constitution and By-Laws of the Metlakatla Indian Community, Annette Islands Reserve, Alaska ("Constitution and By-Laws").¹²

The Community's Constitution and By-Laws states that the Community reorganized itself under section 16 of the IRA in order "to enjoy greater freedom and opportunity in the handling of our affairs and in providing for the welfare of our people." Constitution and By-Laws, Preamble. App. at 1a. The Secretary's approval of the Constitution and By-Laws recognized the Community's ability to govern itself.

The Community's governmental powers are set forth within the main body of the Constitution and By-Laws. Under Article I, the Community exercises "jurisdiction over all the territory and waters described . . . and such other lands and waters as may in the future be acquired by or reserved for the Community." App. at 1a-2a. Under Article II, the Community exercises jurisdiction over its membership. App. at 2a. As the courts have acknowledged, a tribe's right to define its own membership for tribal purposes is central to its existence. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978); see also Cohen, *Handbook of Federal Indian Law* at 20-23 (1982).

Article IV confers upon the Council the power:

"[T]o pass such ordinances for the *local government* of the Community as shall not be in conflict with the laws of the United States, and, wherever there is no applicable clause of the Constitution nor an ordinance of the Metlakatla Indian Community the Council shall have authority to apply and enforce federal law within the boundaries of the Annette Islands Reserve as the law of the Community, except in cases over which the District Court for Alaska may have exclusive jurisdiction."

¹² Selected provisions of the Tribe's Constitution and By-Laws are reprinted in the appendix attached to this brief.

Constitution and By-Laws, Section 1, Article IV (emphasis added). App. at 4a. Under Article IV the Council may prevent the sale of lands or community assets, negotiate with "the Federal and Territorial governments," levy taxes, and direct elections. App. at 4a-7a. Article V authorizes the establishment of a judicial branch which the Council has implemented. App. at 7a.

Together, these provisions demonstrate the governmental purpose behind reorganization under the IRA. As stated by Cohen, "the IRA was intended to provide a mechanism for the tribe *as a governmental unit* to interact with and adapt to a modern society, rather than to force the assimilation of individual Indians." Cohen, *Handbook of Federal Indian Law* at 147 (1982) (emphasis added). Accordingly, an Alaska Native community comprised of members for whom the Secretary of the Interior has approved an IRA constitution is a tribe.

III. FEDERAL STATUTES RECOGNIZE ALASKA NATIVE VILLAGES AS INDIAN TRIBES.

The Metlakatla Indian Community's tribal status is also confirmed by the Indian Self-Determination and Education Assistance Act ("the Self-Determination Act"), 25 U.S.C. §§ 450-450n. The Self-Determination Act is the most important and comprehensive piece of Indian legislation enacted by Congress since the Indian Reorganization Act of 1934. To govern themselves more efficiently, Congress gave Indian and Alaska Native communities unprecedented rights to compel federal agencies to turn over to them the administration of federal programs for the benefit of their members. The Self-Determination Act expressly includes Alaska Native villages such as the Tribe within the definition of "Indian tribes." 25 U.S.C. § 450b(e). All Alaska Native villages as defined in ANCSA are included within the Congressional definition of Indian tribe in the Self-Determination Act. *Id.* Thus, the Act makes clear that these villages, including the Tribe, are political entities

capable of self-government. The Self-Determination Act is both an express and implicit recognition of the tribal status of Alaska Native villages.

Section 2 of the Self-Determination Act states:

"The Congress declares its commitment to . . . the establishment of a *meaningful* self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and *meaningful* participation by the Indian people in the planning, conduct and administration of those programs and services. In accordance with this policy, the United States is *committed* to supporting and assisting Indian tribes in the development of *strong and stable governments*, - capable of administering quality programs and developing the economies of their respective communities."

25 U.S.C. § 450a(b) (emphasis added). This declaration sets a Congressional policy, one that is relevant in interpreting 28 U.S.C. § 1362.

In section 104 of the Self-Determination Act, Congress provided for grants to tribal organizations "for the strengthening or improvement of tribal government," including the development and administration of financial management and personnel systems, the construction and operation of tribal facilities and resources, and the acquisition of land. 25 U.S.C. § 450h(a)(1) and (3). Congressional recognition and support of Indian and Alaska Native self-government is unmistakable.

In sections 102 and 103 of the Self-Determination Act, Congress required the federal government to contract with tribes or tribal organizations for the planning and operation of federal programs. 25 U.S.C. §§ 450f and 450g.¹³ Implicit within these provisions is the assump-

¹³ 25 U.S.C. § 450f(a)(1) states "[t]he Secretary [of the Interior] is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with any tribal organization. . . ." 25 U.S.C. § 450g(a) places a similar duty upon the Secretary of Health and Human Services.

tion that Alaska Native communities, like other Indian tribes, are fully capable of performing governmental functions on the behalf of, and for, their own members.

Congress also recognized the governmental nature of Indian tribes, including Alaska Native communities, by providing in section 110 of the Self-Determination Act that nothing in the Act would diminish the sovereign immunity enjoyed by a tribe or terminate the trust responsibility of the United States with respect to the Indian people. 25 U.S.C. § 450n.

Congressional recognition and response to the need for Indian and Alaska Native tribal self-government is overwhelmingly apparent throughout the Self-Determination Act. In section 3 of the Act, Congress stated that it "hereby recognizes the obligation of the United States to *respond* to the strong expression of the Indian people for self-determination." 25 U.S.C. § 450(a) (emphasis added). The recognition of tribal needs implies that tribal communities are important components of our society. Self-determination requires that we empower tribal communities with the ability to govern and protect themselves in a meaningful way. The right to redress state wrongs in federal court is one such way. Indeed, the purpose of 28 U.S.C. § 1362 was to enable tribes to "take independent steps to protect and assert their constitutional, statutory, and treaty rights." Cohen, *Handbook of Federal Indian Law* at 204 (1982). The denial of Alaska Native villages' right to bring suit under § 1362 will unquestionably limit the ability of the Native villages to exercise self-governing powers. If self-determination has any substance, it lies in the ability of a tribal community to use customary sovereign powers.

An Indian tribe recognized and organized under federal law must have access to the federal courts in order to assert and defend its governmental authority against infringement by state government. To rule otherwise would be to undermine the United States' fundamental

policy of encouraging the development of "strong and stable" tribal governments. Accordingly, the Court must find that those Alaska Native communities reorganized under the IRA or defined as tribes in other federal legislation are tribes.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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December 17, 1990

APPENDIX

APPENDIX

CONSTITUTION AND BY-LAWS
OF THE METLAKATLA INDIAN COMMUNITY,
ANNETTE ISLANDS RESERVE, ALASKA

[SELECTED PROVISIONS]

PREAMBLE

Whereas, by the act of March 3, 1891, the Congress of the United States set apart the lands known as Annette Islands for the use and occupancy of the Metlakatla Indians and other natives of Alaska who might be permitted to join them; and

Whereas, the President of the United States on April 28, 1916, reserved the waters surrounding these islands to a distance of 3,000 feet from the shore line for the use and benefit of the Metlakatla Indians and such other Alaska natives as had joined or might join them; and

Whereas, the Metlakatla Indians have for many years enjoyed a large share of the responsibility for the administration of their affairs under the "Rules and Regulations for Annette Islands Reserve" approved by the Secretary of the Interior on January 28, 1915.

Now, therefore, we, the Metlakatla Indians of Annette Islands Reserve, desiring to take advantage of the benefits available to Indian communities under the acts of Congress of May 1, 1936, and June 18, 1934, and to enjoy greater freedom and opportunity in the handling of our affairs and in providing for the welfare of our people do ordain and establish this Constitution for the Metlakatla Indian Community of the Annette Islands Reserve.

ARTICLE I—JURISDICTION

The Metlakatla Indian Community shall for all purposes of this Constitution exercise jurisdiction over all

the territory and waters described in the aforesaid Act of March 3, 1891, and the Presidential Proclamation of April 28, 1916, and such other lands and waters as may in the future be acquired by or reserved for the Community.

ARTICLE II—MEMBERSHIP

SECTION 1. The members of the Metlakatla Indian Community shall be all the adult persons whose names appear on a list of the members of the Annette Islands Reserve prepared by the Council of the reserve with the assistance of the local representative of the Office of Indian Affairs. The Community Council shall maintain a current list of all members of the Community.

SECTION 2. Before exercising the right to vote for members of the Council or otherwise to participate in the government of the Community, natives of Metlakatla now 21 years old or over, all minors coming of age, and all other natives of Alaska who may be admitted to membership in the Community by vote of the Council, as hereinafter provided, shall subscribe to the following declaration:

DECLARATION

"We, the people of the Metlakatla Indian Community of the Annette Islands Reserve, Alaska, do severally subscribe to the following principles of good citizenship:

"1. To be faithful and loyal to the Government of the United States of America.

"2. To be loyal to the local government of our Community, to obey its ordinances and regulations, and to obey all applicable laws of the Territory of Alaska and of the United States.

"3. To cooperate earnestly in all endeavors for the education of our children, for the advancement of the Community, and for the suppression of all forms of vice."

SECTION 3. All minor children of present or former members of the Annette Islands Reserve or of the Community shall be considered members of the Community until they reach their majority, at which time, in order to continue their membership, they must sign the declaration as provided in paragraph 3, of section 4 of this Article.

SECTION 4. A native of Alaska of indigenous race, over 21 years of age, who has maintained residence within the Annette Islands Reserve for a period of not less than one year, hereafter desiring to become a member of the Community shall proceed as follows:

1. Make application in writing to the Council at Metlakatla, Alaska, for admission to membership in the Community.

2. If the Council approves the application, by a vote of three-fourths of its entire membership, the applicant shall come before a meeting of the Council upon proper notice of the time and place of such meeting.

3. In the presence of the mayor and Council, the declaration in section 2 of this Article shall be read to the applicant, and he or she shall sign a copy of the declaration before two witnesses.

4. After the declaration has been duly signed and witnessed the mayor shall declare the applicant a member of the Metlakatla Indian Community.

5. Minor children of persons so admitted shall be members of the Community, but upon attaining their majority they shall, in order to continue their membership, proceed as set forth in paragraph 3 above.

SECTION 5. The Council is authorized, by a vote of three-fourths of its entire membership, to elect as members of the Community, with full rights and privileges, such British Columbia Indians as may have joined the colony at Metlakatla since January 1, 1900, and main-

tained residence there for a period of not less than two years.

SECTION 6. Continuous absence from Annette Islands Reserve for two years or longer, unless the member so absent shall notify the Council in writing, within such two-year period, of his intention to return, shall constitute forfeiture of membership in the Community. Such person may be readmitted to membership in the Community, as provided in Section 4 of this Article.

ARTICLE IV—THE POWERS OF THE COUNCIL

SECTION 1. The Council shall have power to pass such ordinances for the local government of the Community as shall not be in conflict with the laws of the United States, and, wherever there is no applicable clause of the Constitution nor an ordinance of the Metlakatla Indian Community the Council shall have authority to apply and enforce Federal law within the boundaries of the Annette Islands Reserve as the law of the Community, except in cases over which the District Court for Alaska may have exclusive jurisdiction.

A copy of each ordinance passed by the Council and certified by the signature of the mayor or of the acting mayor shall, within three days after its passage, be handed by the secretary to the local representative of the Office of Indian Affairs at Metlakatla.

SECTION 2. The Council shall have power to employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease or encumbrance of community lands, interests in lands, or other community assets without the consent of the Community; and to negotiate with the Federal and Territorial governments.

SECTION 3. The Council is authorized to levy an annual tax of three dollars (\$3), or of such a sum as it may deem necessary not exceeding three dollars (\$3) upon

each able-bodied male member of the Community between the ages of 21 and 60, said tax to be collected by the secretary and expended for public purposes as the Council shall direct. The Council may, by a two-thirds vote of its membership, remit the annual tax of any individual who because of continued sickness, poverty, or physical or mental disability is unable to pay said tax.

SECTION 4. The Council shall have authority to direct by its ordinance that every able-bodied male resident of the Community shall perform, without remuneration, in each calendar year not more than two days' labor of 8 hours each on the streets, roads, wharves, public buildings, or other public improvements, within the Annette Islands Reserve undertaken by order of the Council.

The secretary shall keep a record of the labor thus performed, showing the dates, the number of hours, and the character of the service rendered by each person.

SECTION 5. The Council shall direct the secretary to draw warrants on the treasurer in payment of all valid claims against funds subject to its control. All such warrants shall be signed by the mayor or by the acting mayor.

SECTION 6. The Council may issue to members of the Community permits to occupy land within the reserve and it may cancel such permits as provided in Section 1, Article VI of this Constitution.

SECTION 7. At the first meeting of the Council in each year the Council shall elect an auditing committee of three members and a public health committee of three members. From time to time, as the Council may deem necessary, it may constitute other committees and define their duties. All committees elected under this Constitution shall serve without remuneration.

The secretary shall, within three days after their election report the names of persons elected to member-

ship in committees to the local representative of the Office of Indian Affairs at Metlakatla.

SECTION 8. The Council shall have authority to employ such a number of competent persons as constables as it may deem necessary in order to enforce its ordinances, to define their duties and to fix their remuneration, if any. The constables shall be under the immediate control of the mayor or of the acting mayor, subject to the instructions of the Council.

SECTION 9. The Council may create such additional offices, not in conflict with this Constitution, as it may deem necessary for the effective administration of the local government, provide for the filling of such offices, define the duties of the same, and fix the amount of the remuneration, if any.

SECTION 10. The Council shall prescribe rules regarding the place and conditions of the annual election. Notices of said election shall be posted in three or more places in the reserve at least 10 days prior to such election.

SECTION 11. The Council may by the vote of three-fourths of its entire membership remove the mayor, secretary, treasurer or other official, but only after reasonable notice and upon sufficient evidence offered at an open meeting that he is unworthy to hold office; and the Council may by the same procedure and the vote of three-fourths of its entire membership, expel a member of the Council.

SECTION 12. When a vacancy occurs in the membership of the Council or in any office, the Council may, until the time of the next annual election, temporarily fill such vacancy by a two-thirds vote of its membership, and provide for the induction into office of the person so elected.

SECTION 13. The Council may provide for mass meetings of the members of the Community. Public questions

may be discussed at these meetings and the secretary of the Council shall take note of any petition made on these occasions and preserve it among the official records of the Community.

ARTICLE V—JUDICIARY

SECTION 1. The Council shall at its first meeting of each year designate a magistrate for the Community.

SECTION 2. The magistrate shall have power to impose upon any violator of an ordinance passed by the Council, such a fine as may be deemed just not exceeding three hundred and sixty dollars (\$360) for each offense.

SECTION 3. In each case, before the magistrate makes his decision, the person accused of such violation shall be given opportunity to appear before the magistrate and make any statement that he or she may wish to make.

SECTION 4. The secretary shall, within three days after such a fine has been imposed by the magistrate, hand to the person upon whom the fine has been imposed written notification thereof, countersigned by the mayor or acting mayor, setting forth the amount of the fine and the reasons for which it has been imposed.

SECTION 5. Fines thus imposed shall be collected by the secretary and by him deposited with the treasurer, to be expended at the direction of the Council as other funds are expended.

SECTION 6. Whenever a fine which has been thus imposed remains unpaid for a period of four weeks from and including the day upon which notification thereof was received by the delinquent, the magistrate may, in lieu of the payment of the fine, require the delinquent to labor not more than ninety (90) days on the streets or other public works of the Reserve. The expenses in connection with such sentence shall be paid from funds under the control of the Council.

FOR ARGUMENT

No. 89-1782

DEC 17 1990

LEONARD E. SPANGL, JR.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF
COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK and
CIRCLE VILLAGE,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF AMICI CURIAE OF THE
NATIVE VILLAGE OF TANANA, NATIVE VILLAGE
OF TATITLEK, NATIVE VILLAGE OF CHENEGA,
PORT GRAHAM VILLAGE, ENGLISH BAY VILLAGE,
EYAK NATIVE VILLAGE, SITKA COMMUNITY
ASSOCIATION, NATIVE VILLAGE OF SELAWIK,

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NATIVE VILLAGE OF KOTZEBUR, NATIVE VILLAGE
OF BUCKLAND, NATIVE VILLAGE OF DEERING,
NATIVE VILLAGE OF KIVALINA, NOORVIE NATIVE
COMMUNITY, NATIVE VILLAGE OF SHUNGNAK,
VILLAGE OF AMBLER, KIANA VILLAGE, KOBUK
VILLAGE, BIRCH CREEK VILLAGE, HOLY CROSS
VILLAGE, NATIVE VILLAGE OF FORT YUKON,
IVANOFF BAY VILLAGE, NULATO VILLAGE, NATIVE
VILLAGE OF UNALAKLEET, NATIVE VILLAGE OF
VENETIE, SHAGULUK NATIVE VILLAGE, NATIVE
VILLAGE OF RUBY, ORGANIZED VILLAGE OF
KWETHLUK, NATIVE VILLAGE OF AKIACHAK,
NATIVE VILLAGE OF TOKSOOK BAY, NATIVE
VILLAGE OF SCAMMON BAY, NATIVE VILLAGE
OF BEK, VILLAGE OF KALSKAG, NATIVE VILLAGE
OF KWIGILLINGOK, NATIVE VILLAGE OF
BILL MOORE'S SLOUGH, NATIVE VILLAGE OF
QUINHAGAK, PLATINUM TRADITIONAL VILLAGE,
NATIVE VILLAGE OF KIPNUK, NATIVE VILLAGE
OF SAVOONGA, NATIVE VILLAGE OF STEVENS,
ORGANIZED VILLAGE OF KAKE, CHILKAT INDIAN
VILLAGE OF KLUKWAN, NATIVE VILLAGE OF
GAMBELL, NENDALTON VILLAGE, VILLAGE OF
DOT LAKE, VILLAGE OF EAGLE, HEALY LAKE
VILLAGE, NORTHWAY VILLAGE, NATIVE VILLAGE
OF TANACROSS, ALLAKAKET VILLAGE, NENANA
NATIVE ASSOCIATION, BEAVER VILLAGE, COPPER
CENTER VILLAGE, NATIVE VILLAGE OF
CHISTOCHINA, NATIVE VILLAGE OF TAZLINA,
NATIVE VILLAGE OF CHITINA, MENTASTA
VILLAGE, NATIVE VILLAGE OF CANTWELL,
GULKANA VILLAGE, NATIVE VILLAGE OF GAKONA,
NATIVE VILLAGE OF AKHIOK, NATIVE VILLAGE
OF PORT LIONS, NATIVE VILLAGE OF OUZINKIE,
NATIVE VILLAGE OF LARSEN BAY, NATIVE
VILLAGE OF KARLUK, VILLAGE OF OLD HARBOR,
AKIAK NATIVE COMMUNITY, VILLAGE OF
ALAKANUK, VILLAGE OF ANIAK, VILLAGE OF
ATMAUTHLUAK, VILLAGE OF CHUATHBALUK,
VILLAGE OF CHEFORNAK, CHEVAK NATIVE
VILLAGE, NATIVE VILLAGE OF GOODNEWS BAY,
NATIVE VILLAGE OF HOOPER BAY, NATIVE
VILLAGE OF KASIGLUK, KONGIGANAK NATIVE
VILLAGE, VILLAGE OF KOTLIK, LIME VILLAGE,

NATIVE VILLAGE OF MEKORYUK, NATIVE VILLAGE
OF MOUNTAIN VILLAGE, NAPASKIAK TRADITIONAL
VILLAGE, NEWTOK VILLAGE, NATIVE VILLAGE OF
NUNAPITCHUK, PILOT STATION TRADITIONAL
VILLAGE, NATIVE VILLAGE OF PITKA'S POINT,
NATIVE VILLAGE OF SHELDON'S POINT, ST. MARY'S
VILLAGE (ALGAACIQ), TULUKSAK NATIVE
COMMUNITY, NATIVE VILLAGE OF TUNTUTULIAK,
NATIVE VILLAGE OF TUNUNAK, NATIVE VILLAGE
OF ANDREAFSKY, NATIVE VILLAGE OF LOWER
KALSKAG, NATIVE VILLAGE OF HAMILTON,
STEBBINS COMMUNITY ASSOCIATION, TLINGIT AND
HAIDA INDIAN TRIBES OF ALASKA, COUNCIL OF
ATHABASCAN TRIBAL GOVERNMENTS, NORTHWEST
ARCTIC BOROUGH, ALASKA FEDERATION OF
NATIVES, AND ASSOCIATION ON AMERICAN
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IN SUPPORT OF RESPONDENTS

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BRIEF AMICI CURIAE

INTERESTS OF AMICI

Amici Indian, Aleut and Eskimo villages are 94 of the federally-recognized tribes identified in the 1971 Alaska Native Claims Settlement Act, spread across a vast area one-fifth the size of the contiguous United States and representing in the aggregate in excess of 80,000 Alaska Natives.¹ They have inhabited Alaska since time immemorial and have a vital interest in preserving both their recognized tribal status and their full access to federal court to redress state action violative of their retained inherent sovereignty.

Amicus Alaska Federation of Natives is a statewide Alaska Native organization that strongly supports village tribal rights and was deeply involved in securing passage of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. 1601, *et seq.* *Amicus* Northwest Arctic Borough is a political subdivision of the State of Alaska and has by ordinance formally recognized the eleven villages (including Respondent Native Village of Nontak) situated within its borders as Native American tribes which are "organized as bodies politic . . . eligible for borough funding, grants and contracts" to assist in governmental activities at the tribal level.²

Amicus Tlingit and Haida Indian Tribes of Alaska are a confederated federally-recognized tribe comprising approximately 16,000 enrolled members.³ The Tlingit and

¹ There are 200 Native village tribes in Alaska stretching from from the southern extremity of the Alaska panhandle to the furthest northern and western regions of the continent. They embrace an area roughly equal to the combined land mass of California, Oregon, Washington, Montana, and Arizona similarly containing in the aggregate 189 Native American tribes.

² Northwest Arctic Borough Code 02.90.010 (1990).

³ See Act of June 19, 1933, 49 Stat. 388, as amended by the Act of August 19, 1963, 79 Stat. 543; *Tlingit and Haida Indians of Alaska v. United States*, 389 F.2d 778, 781 (Ct. Cl. 1968) (compensating tribal claims of aboriginal title).

Haida Central Council, the tribal governing body elected under federally approved rules, currently administers \$6 million in programs benefitting its members under the terms of the Indian Self-Determination Act, 25 U.S.C. 450 *et seq.*, and other legislation. As the governing body of the largest tribe in Alaska, the Central Council has an abiding interest in the maintenance of tribal status throughout Alaska. Amicus Council of Athabascan Tribal Governments is an intertribal organization working on behalf of the several Athabascan Gwitch'in Tribes of Alaska.

Amicus Association on American Indian Affairs, Inc. is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting and enhancing the self-government rights and culture of American Indians and Alaska Natives. The Association is the largest Indian-interest organization in the United States.

Amici offer this brief in response to the second question presented in Alaska's petition for a writ of *certiorari*: whether the Native American villages identified in the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. 1601 *et seq.* ("ANCSA"), are federally recognized tribes, qualified to bring suit under 28 U.S.C. 1362.⁴

INTRODUCTION

Of all the Nation's aboriginal inhabitants, perhaps none have succeeded better in holding fast to their rich and diverse cultures, traditions, lifestyles and languages than the 200 Indian Eskimo and Aleut tribes of Alaska.

⁴The Ninth Circuit below held that (1) a federal question is presented when it is alleged that a state has deprived a tribe of a state benefit on account of race; (2) a tribe may assert such a claim in federal court against a state for money damages notwithstanding the Eleventh Amendment; (3) a recognized tribe may predicate such a claim on 28 U.S.C. 1362; and (4) the plaintiff villages are duly recognized Native American tribes that may properly prosecute such claims. This brief is offered to assist the Court's deliberations on the fourth issue in the event the first three issues are resolved in Respondents' favor.

Protected from the dominant society by extreme isolation,⁵ a harsh environment and relatively recent incorporation into the United States,⁶ Alaska Native tribes largely managed to escape the period of Indian wars, the treaty period, the Indian removal period, the reservation period, and the allotment period, all aspects of a long-discredited federal policy of suppressing (if not eliminating) tribal self-governance in favor of assimilation.⁷

The good fortune of Alaska's tribes is reflected in the character of their lives today. Thus, throughout village Alaska, Native people literally live off the land, engaging in a subsistence way of life that is intimately woven into the shifting seasons and the migratory patterns of caribou, whales, seals, walrus, salmon, geese, and countless other species.⁸ Long summer days are spent curing, smoking, salting or drying subsistence foods, gathering berries, cutting wood and making preparation for the nine-month long winter. Through these activities the values of the tribal community are passed on from generation to generation.⁹

⁵Most Alaska Native villages are overwhelmingly inhabited by Indians, Eskimos or Aleuts. According to the 1980 decennial census of the U.S. Bureau of Census, three-quarters of the population of each counted village is over 75% Native, and over 90% of the villages are in excess of 50% Native. In 107 villages, over 90% of the population is Native.

⁶See Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339 (1958), as amended; see also Treaty of Cession (March 30, 1867), United States-Russia, 15 Stat. 539, T.S. No. 301; District Organic Act of 1884, 23 Stat. 24 (1884); Territorial Organic Act of 1912, c. 387, 37 Stat. 512 (1913).

⁷See generally F. Prucha, *The Great Father* (1984); F. Cohen, *Handbook of Federal Indian Law* 47-206 (1982) (discussing the sequential periods of federal Indian policy).

⁸See generally T. Berger, *Village Journey, Report of the Alaska Native Review Commission*, 48-72 (1985).

⁹See, e.g., Alaska Department of Fish and Game, Division of Subsistence, *Subsistence in Alaska, Arctic, Interior, Southcentral, Southwest, and Western Regional Summaries* at 67, 123, 172, 226

No other aboriginal people in America have succeeded so well in retaining their hunting, fishing and gathering societies into the eve of the Twenty-First century,¹⁰ and in maintaining thriving cultures, one foot in each world, founded on traditional practices and values adapted to modern needs and circumstances. Against this background it is remarkable that challenges persist¹¹ against past long-standing recognition of the inherent tribal status of Alaska Native villages. The relatively protected history of Alaska's Indian, Eskimo and Aleut villages, and their escape from the Nation's removal and reservation policies, surely by all logic cannot and should not leave them with fewer attributes of "domestic dependent nations" as quasi-sovereign tribes than their more acculturated brethren in the 48 contiguous states. *Amici* demonstrate below that the Ninth Circuit was clearly correct in its conclusion that the Native villages of Alaska, whether organized traditionally or organized under Sec-

(Technical Paper No. 150) (1987); United States Department of the Interior, Fish and Wildlife Service, *Subsistence Management & Use; Implementation of Title VIII of ANILCA* at II-2.5 (1985) (hereinafter "Subsistence Use"); Alaska Department of Community & Regional Affairs, *Does One Way of Life Have to Die So That Another Can Live?* (1974) (copy lodged with the Clerk of the Court).

¹⁰ In many villages today the Native language remains predominant. These languages include three broad language families consisting of eleven different Athabascan Indian languages (in the interior of Alaska); Eyak, Tlingit and Haida (along the southeast coast); and several Inupiaq, Yupik and Aleut dialects (in western and northern Alaska). E. Smith and M. Kancewick *The Tribal Status of Alaska Natives*, 61 Colo. L. Rev. 455, 485 (1990) ("Smith and Kancewick"). The Athabascan languages in Alaska are also spoken among the Navajo and Apache of the contiguous 48 states.

¹¹ For a general discussion of recent litigation involving the powers and immunities of Alaska Native tribes, see L. Miller, *Caught in a Crossfire: Conflict in the Courts, Alaska Tribes in the Balance*, 1989 Harvard Indian Law Symposium 135-151 (by the President and Fellows of Harvard College).

tion 16 of the Indian Reorganization Act (25 U.S.C. 476), are indeed sovereign tribes on an equal footing with other Native American tribes in the United States and are thus fully empowered to bring suit against the State of Alaska under 28 U.S.C. 1362 to vindicate their federally-protected rights.

SUMMARY OF ARGUMENT

Recognition of a Native American group as a tribe is within the exclusive province of the Federal Government acting through Congress or the Executive Branch, whose affirmative judgment in such matters represents a political question not reviewable by the courts.

Consistent with this Court's acknowledgment in *Tee Hit Ton Indians v. United States*, 348 U.S. 272 (1955), Congress has long treated Alaska Natives as distinct Native communities comprising recognized tribes. This congressional recognition is consistent with the extant anthropological and ethnographic literature regarding the political structures of Alaska Native communities, including special congressionally mandated studies.

In the Alaska Native Claims Settlement Act of 1971 Congress necessarily recognized Alaska Native villages as distinctly Native communities comprising tribes, and has since repeated that recognition in a broad range of other legislation. To the same effect have been the consistent and uninterrupted actions of virtually every department of the Federal Government, including the Department of the Interior.

The recognized status of Alaska Native village tribes is further reflected in the tremendously vital and rich functions performed by Indian, Eskimo, and Aleut tribes today. By administering programs and providing for the health, safety and public welfare of their members, the tribes continue to exercise the prerogatives of self-governing "domestic dependent nations" which have long been recognized by the Federal Government.

ARGUMENT

THE ALASKA NATIVE VILLAGES IDENTIFIED IN THE ALASKA NATIVE CLAIMS SETTLEMENT ACT OF 1971 ARE RECOGNIZED TRIBES QUALIFIED TO BRING SUIT UNDER 28 U.S.C. 1362.

A. Congressional and Executive Branch Determinations Recognizing the Tribal Status of Native American Groups are Primarily "Political Questions" which are Not Reviewable in the Courts.

"Indian tribes consistently have been recognized . . . as 'distinct independent, political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." F. Cohen, *Handbook of Federal Indian Law* 232 (1982 Ed.) ("Cohen") quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). See also *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). That original sovereignty inheres in a "tribe" "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory" *Montoya v. United States*, 180 U.S. 261, 266 (1901). Determining which Native American communities constitute "tribes" is largely a "political" question of "recognizing" a community to be a tribe, a question within the exclusive province of Congress. *U.S. v. Holliday*, 70 U.S. (8 Wall.) 407, 419 (1865).

"Recognition" of a tribe often is effected by Congress in the context of a government-to-government agreement with the tribe, embodied in a treaty or a statute. Such recognition, however, need not be expressly stated and typically is not. Cohen, *supra* at 3-4. Rather, by the very fact of 'treating' or legislating with respect to a tribal entity, Congress is deemed to have recognized the sovereign status of that tribe. That is, since the relationship between tribes and the Federal Government is a political one, congressional action with respect to a dis-

tinently Native American community constitutes confirmation of the community's political quasi-sovereign status.¹²

On some occasions Congress is more explicit, as when it specifically defines an Indian entity to be a tribe in a statute. Similarly, Congress has at times delegated part of its power to recognize particular groups as "tribes" to the Secretary of the Interior, as it has in Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, and in 25 U.S.C. 1, 2 and 9.¹³ In other instances, congressional action is less explicit, though just as direct, as when this Court concluded that the Pueblos—"distinctly Indian communities"—qualified as recognized tribes in major part by virtue of their dependency and receipt of federal Indian services. *United States v. Sandoval*, 231 U.S. 28, 39-40, 46, 47 (1913). These "political" judgments are final and binding, *Sandoval, supra* at 46; *Holliday, supra* at 419; *Perrin v. United States*, 232 U.S. 478 (1914), the only limitation on congressional authority being that Congress may not arbitrarily take a group of non-Indians and deem them to be a politically sovereign "tribe." *Sandoval, supra* at 46.

¹² As noted in Respondent Nontak's brief, Resp. Br. at —, Congress's power in this area is broad, and it is not limited to so-called "historical" or "ethnological" tribes. Cohen *supra* at 5-6. Thus, in the course of recognizing the tribal status of some 500 politically distinct modern-day tribes in the United States, Congress has frequently divided historic tribes, consolidated (or confederated) historic tribes, and even done both simultaneously. Clearly Congress has never considered itself limited to recognizing as tribes only the modern-day successors to historic tribes (although, as discussed below, in Alaska Congress has, in fact, typically done so).

¹³ *James v. U.S. Department of Health and Human Services*, 824 F.2d 1132 (D.C. Cir. 1987); see also 25 C.F.R. pts. 31, 32 and 83 (1990); Cohen, *supra* at 13-16. In the absence of congressional or secretarial recognition, unrecognized tribal status may in the alternative be judicially proven and, with it, the inherent sovereign authority which flows from that status. *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982), *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 585-87 (1st Cir.) cert. denied, 444 U.S. 866 (1979).

B. In Enacting the Alaska Native Claims Settlement Act of 1971 Congress Was Well Aware and are Today Distinctly Native Communities Comprising Tribes.

Congress has long been well aware of the tribal nature of Alaska Native societies.¹⁴ For instance, one year prior to Congress's passage of amendments to the Indian Reorganization Act (IRA) to address unforeseen difficulties in the Act's application in Alaska,¹⁵ the U.S. Office of Education commissioned a special study on Alaska Inupiaq and Yupik Eskimo and Aleut villages. H.D. Anderson and W.C. Eells, *Alaska Natives: A Survey of Their Sociological and Educational Status* (1935). Anderson and Eells found that the permanent village was a political, self-governing unit that had long been the characteristic community for Alaska Natives. *Id.* at 31-37, 48-50. They disavowed the erroneous, uninformed view that traditional self-governance did not exist, stating that such a view "fail[s] utterly to take into account those naturally developed means of social control which serve the purposes of government and in fact are government." *Id.* at 48. After exhaustively describing Eskimo and Aleut forms of governance,¹⁶ Anderson and Eells concluded that

¹⁴ Congressional recognition of the tribal status of Alaska Native communities began with the original 1867 Russian American Treaty of Cession. See Article III of the Treaty of March 30, 1867, 15 Stat. 539, making express provision for the "native tribes" uncivilized tribes [in the ceded territory of Alaska] will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country". See also Secretary Seward's Memorandum to President Johnson and Russian Minister Stoeckl's dispatch, both discussing Article III, in Miller, *The Alaska Treaty* at 71, 81 (1981).

¹⁵ See Act of May 1, 1936, 49 Stat. 1250, codified in part at 25 U.S.C. 473a.

¹⁶ See generally Anderson and Eells at 48-50. (Ch. VIII, *Early Social Organization and Government*), 144-150 (Ch. XX, *Social Organization and Government*). Accord A. Fienhup-Riordan, *Regional Groups on the Yukon-Kuskokwim Delta* (Etudes Inuit 1984) (describing the regional confederations among the Yupik villages of the lower Yukon-Kuskokwim Rivers).

"all the necessary indications of a 'tribe' existed." *Id.* at 146.¹⁷

Indeed, to conclude the single villages were not self-governing entities—tribes—since long before the Alaska Purchase is to suggest Alaska's Native people simply lived in chaos, in a state of anarchy, with no internal forms of control for managing village life and interacting with others.¹⁸ As Congress well understood at the time of ANCSA's consideration, the facts are otherwise.

¹⁷ With this report in hand Congress in 1936 amended the IRA to overcome drafting limitations in the original Act which had unintentionally impeded implementation of the Act of Alaska. Chief among these was the requirement that Indians reside on a reservation, a requirement eliminated in the 1936 IRA Amendment. See generally Respondent Noatak Br. at —.

¹⁸ This Court has previously acknowledged the tribal status of Alaska Native communities. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). See, e.g., 348 U.S. at 273, 275, 279, 282, 285, 286 (noting the Tee-Hit-Ton to be "a clan of the Tlingit tribe, an identifiable group of American Indians . . . residing in Alaska" and a "tribe" with "tribal" attributes including sovereign land claims), 287-288 (observing "that land claims among the Tlingits, and likewise of their smaller group, the Tee-Hit-Tons, was [sic] wholly tribal. It was more a claim of sovereignty than of ownership", and concluding "that the [Tribe's] use of its lands was like the use of the nomadic Indians of the [Lower 48] states Indians.").

As the American Indian Policy Review Commission noted, "Quite clearly, Alaska Natives were governing themselves for thousands of years prior to their contact with the Russian-American Company or the U.S. Government." American Indian Policy Review Commission, *Special Joint Task Force Report on Alaskan Native Issues* 21 (1976). See also, *Russian Administration of Alaska and the Status of the Alaskan Natives*, Sen. Doc. No. 152, 81st Cong., 2d Sess. (1950). In a comprehensive and more recent treatise specifically directed to the legal status of Alaska Natives, a review of much of the extant anthropological literature led to the same conclusion:

All Alaska Native traditional societies had political systems (structures and processes) which governed their members and controlled individual behavior. These arrangements, like those in many other Native American societies, operated successfully

Congress obtained a wealth of information during its deliberations over Alaska's aboriginal land claims when it commissioned the Federal Field Committee for Development Planning in Alaska to study all aspects of Alaska Native life. This massive study of Alaska Native history, society, resource use, land use and economic status formed the factual basis for the settlement of Alaska Native land claims.¹⁹ Entitled *Alaska Natives and the Land*, the report divided the state for descriptive purposes into several regions, corresponding to ethnological linguistic groupings of Native people. It then described for each region of the state and in varying degrees of detail the available social and anthropologic data regarding the political organization of Native villages.²⁰ \

in the absence of specialized political institutions or centralized state governments. Ideological beliefs and customary laws defining interpersonal relationships and spiritual relationships to the environment and wildlife created a tacit, yet powerful, sanction system which contributed to the maintenance of social order. Mechanisms for identifying a society's territory and political autonomy and for regulating external relationships with other societies existed in all cultural groups.

D. Case. *Alaska Natives and American Laws* 333 (1934) (emphasis added) (hereafter "Case"). See also Case at 361-62; Cohen at 750-752. Similar observations are contained throughout volumes 5 and 6 of the Smithsonian Institution's multi-volume treatise on North American Indians. This massive and authoritative ethnography of Native Americans describes at length the tribes and political self-governing structures of Alaska's Native people. Smithsonian Institution, *Handbook of North American Indians*, Vol. 5 (Arctic), Vol. 6 (SubArctic).

¹⁹ Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* (1968). This report was prepared at the request of Senator Henry M. Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, and is recognized as a principal factual basis for much of ANCSA. The Report is a formal part of ANCSA's legislative history, S. Rep. No. 405, 92d Cong., 1st Sess. 73-74 (1971).

²⁰ Respondent Noatak is an Inupiaq Eskimo Tribe situated north of Kotzebue. Respondent Circle is a Gwitch'in Athabascan Indian tribe situated in Northeastern Alaska south of the Brooks Range

The Field Commission confirmed for Congress the tribal nature of Native societies. For example, with reference to the Bering Strait Eskimos (the people living just to the south of the Noatak and other Northwest Inupiaq Eskimos), the study found:

[as to] the fancy that Eskimo people had no political or territorial concepts, boundaries to property or hunting territories[:]. Quite the contrary was actually true. . . . The Bering Strait Eskimo did not live in anarchy; he lived in a well-ordered society in which a chief and often a council played an important role. The influence of their government extended over a definitely bounded territory within which the inhabitants were directed by a system of rules and laws.

Alaska Natives and the Land at 144, 146.²¹

along the Yukon River. Although amici therefore focus discussion on these regions, the tribal characteristics of their villages are similarly documented throughout the other Eskimo, Aleut and Indian tribes of Alaska.

²¹ *Alaska Natives and the Land* relies heavily on work by Dorothy Jean Ray, noted authority on the Bering Strait Eskimos. *Alaska Natives and the Land* at 147-152. More recent work by Ray explains in considerable detail the tribal structure of that Eskimo people:

A tribe consisted of people with a common language and culture living within well-defined boundaries recognized by themselves and contiguous tribes. A tribal territory usually included a large river and all the land drained by its tributaries. . . .

Ray, *Kotzebue Sound Eskimo* in 5 *Handbook of North American Indians* 285, 286 (1984). Accord, Ray, *Eskimos of the Bering Strait 1650-1898*, 105-106 (1975). The focal point of the Eskimo village was the kashim or "men's house" which served as the political and social center for the community. *Eskimos of the Bering Strait*, *supra* at 106-107.

Ernest S. Burch, Jr., the principal, modern commentator on the anthropology of Northwest Alaska Eskimos has found that the same conclusions apply to the Eskimos of that region, including the Noatak people. See Burch, *Kotzebue Sound Eskimo*, in 5 *Handbook of North American Indians* 303 (1984); Burch, *The Cultural and Natural Heritage of Northwest Alaska*, in V *The Inupiaq Nations*

The Gwitch'in Indians (including those living in the vicinity of what is now Circle) were similarly described by the Field Commission as "tribes." *Alaska Natives and the Land* at 205. The Commission noted that while these peoples were perhaps more nomadic than the coastal Eskimos, they nonetheless inhabited villages "on the main rivers and streams . . . [which] acted as base occupation centers and were complementary to many family and group fish campsites along the rivers and interior hunting and trapping camps." *Id.* at 207. Again, other anthropological work has confirmed this conclusion.²²

As the Field Commission observed, village "tribal" structures also historically existed in the other regions of Alaska.²³ Those tribes, and their accompanying social

of Northwest Alaska (1985) (unpublished manuscript) (copy lodged with the Clerk of the Court). As Burch notes:

[Ray] has depicted the early contact Eskimo as having been organized in terms of relatively cohesive political units which she called "tribes" each with a general adjustment to its surroundings. My own research has confirmed Ray's findings, and has permitted me to extend them analytically, temporally, and geographically.

E.S. Burch, Jr., *Traditional Eskimo Societies in Northwest Alaska, Alaska Native Culture and History*, in *Senri Ethnological Studies* No. 4 at 253 (1984).

²² See, e.g., Caulfield, *Subsistence Land Use in Upper Yukon-Porcupine Communities, Alaska*, Alaska Department of Fish and Game Technical Paper No. 16 at 92, 111-14, 127-31, 145-49 (1983) ("Caulfield"); Slobdin, *Kutchin* in 6 *Handbook of North American Indians* 514-15, 520-24 (1984). A study commissioned by the Alaska Department of Education agrees. See Peratrovich, *Source Book on Alaska* at 27 (1971) ("Each group is headed by some man who, by common consent, is recognized as chief. . . . Community affairs are settled by a general council in which the chief and the older men of the group rule").

²³ E.g., *Alaska Natives and the Land* at 47 (villages generally), 129-137 (Arctic Slope Eskimos), 178-187 (Southwest Coastal Eskimos), 195-201 (Koyukuk-Lower Yukon Eskimos and Indians), 222-229 (Bristol Bay Eskimos), 236-243 (Aleuts), 264-269 (Chugach and Eyak Indians). The Tlingit and Haida Indians were also

and governmental structures, survived and adapted to contact with Western culture. As the leading modern Indian law treatise concludes:

Customary society underwent many alterations after contact, first with Russians and later with Americans, *although virtually every Native village or community retained some kind of traditional self-governing structure*. Most established councils for community decision-making and dispute adjustment. The councils employed procedures and adopted rules reflecting their origins as hybrids of the influence of the non-Natives who urged their establishment and Native tradition which persisted in importance.

Cohen at 750-751 (emphasis added) (footnotes omitted). See generally *Alaska Natives and the Land*, at 41, 87, 130-31, 187, 197, 207, 212, 220, 224-25, 238-39 (describing forces affecting traditional communities).

The modern-day Indian, Aleut and Eskimo villages retain direct links with the Natives' ancestral sites. The Gwitch'in Indians, for example, were divided into eight tribes, each with well-defined territories, that "recognized a relationship which united them into what . . . might be called correctly enough a nation." Osgood, *Kutchin Tribal Distribution and Synonymy*, 36 *Amer. Anthropologist* 168, 169 (1934). For those Gwitch'in tribes located in Alaska,²⁴ each tribe lived in a particular area within the Gwitch'in Nation, an area that corresponds precisely to a modern-day village. For example, the present residents of Circle are descendants of the Kutchakutchin who lived along the Yukon River, as well

organized in villages, governed by clans, *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452, 455-456 (Ct. Cl. 1959).

²⁴ These tribes include the Kutchakutchin, the Tranjikkutchin, the Natsitkutchin, and the Birch Creek Kutchin. *Alaska Natives and the Land* at 206; 6 *Handbook of North American Indians* at 514-15.

as those living in Charley's Village;²⁵ Circle itself is located near an historic village site.²⁶

Like the Gwitch'in and other aboriginal tribes, the tribes of the Bering Strait were keenly aware of their own territories and took special care to guard their territorial integrity:

As between sovereign nations today, permission was needed to travel between tribes, and names were the

²⁵ The residents of Charley's Village moved to Circle in 1914 after Charley's Village was destroyed by ice. *Alaska Natives and the Land* at 206 (noting that some Circle residents were Hankutchin). Outside pressure on these villages, though late, was severe. Thus in discussing the problems caused by the establishment of a trading post at a Native village site at Fort Yukon, the Bishop of Alaska asked:

Have the Indians no rights? I mean exclusive rights in the villages of immemorial times? . . . This is an instance—a flagrant one—but one that is typical of what has gone on at Eagle and Circle and Rampart and Tanana.

Letter dated March 9, 1914 from Rev. P.T. Rowe to Secretary of Commerce Redfield; (emphasis added) (copy lodged with the Clerk of the Court). Circle is also the burial place of a famous Gwitch'in chief. See Caulfield *Gwitch'in Athabascan Place Names of the Upper Yukon-Porcupine Region—Alaska: A Preliminary Report*, Alaska Department of Fish & Game, Technical Report No. 83 at 8 (1983).

It is important to note in this context that the Federal Government established a one-acre reserve at Circle in 1910 (Executive Order No. 1194 (April 26, 1910)), and later considered establishing a 75-square mile reserve. Attachment to letter dated April 17, 1944 from T.W. Wheat, Assistant Director of Lands, Office of Indian Affairs, Field Service, to William Zimmerman, Assistant Commissioner of Indian Affairs (copy lodged with the Clerk of the Court).

²⁶ Similarly, *amicus* Chalkyitsik residents are Tranjikkutchin who lived in settlements along the Black River; the present village site in a seasonal fish camp that became a permanent village when a school was built. Caulfield at 127-31. A similar history applies to the present villages of *amicus* Venetie and Arctic Village, home to the Natsitkutchin; to *amicus* Fort Yukon, home of the Kutcha-kutchin; and to *amicus* Birch Creek, home to the Birch Creek

important passports that proved relationships and served as entry to another territory.

Eskimos of the Bering Strait, supra at 108.²⁷ Anthropologists identify twelve tribes in Northwest Alaska extant between 1800 and 1825, with a remarkable identity between these historical nations and the present villages. Notable among them, for purposes of this case, is the *Napaaqturmiut* Tribe, or lower Noatak, from which it may be reliably inferred that the Native Village of Noatak is descended.²⁸

The Field Commission documents similar and extensive correspondences between historical tribal locations and present-day Native villages throughout Alaska.²⁹ In

Kutchin. *Alaska Natives and the Land* at 206; Caulfield at 92, 111-14, 145-49, 170-73.

²⁷ These boundaries actually defined the tribe and its territory:

The largest village lent its name to the tribe. Thus *Kauweramiut* or "people of Kauwerak," meant essentially "the people who lived in territory presided over by the people of Kauwerak."

Eskimos of the Bering Strait, supra at 106. Burch notes that the entities variously referred to by Ray as "tribes" might more properly be called "nations." In Inupiaq the term is *nunatqatigiit*:

Nation is an appropriate word to use because *nunatqatigiit* were, in fact, organizations of a type that were analogous to countries, or nations, in the modern world. They were viewed in essentially those terms by the peoples who comprise their citizenry.

The Inupiaq Nations of Northwest Alaska, *supra* at 1.

²⁸ See 5 *Handbook of North American Indians* at 304, Fig. 1 "Societal territories, about 1800 to 1825"; Inupiaq Nations of Northwest Alaska, *supra* at 11, Fig. 3 "Political Map of Northwest Alaska, ca 1800-1825." These maps specifically identify the territory of *Napaaqtugmiut* with that area occupied by the present village of Noatak.

²⁹ The Field Commission report contains maps of historical and contemporary tribal locations for each ethnographic region of the state. See, e.g., *Alaska Natives and the Land* at 136-137 (Arctic Slope); 156-157 (Bering Strait Region including the Northwest Arctic); 210-211 (Upper Yukon-Porcupine Region); 278-279 (Southeast Alaska).

most cases, the villages are located at or near traditional sites; in others, a tribe changed location due to natural disasters or the establishment of schools or trading posts, though it nonetheless remained within the territory it traditionally claimed for resource gathering.³⁰ The inevitable conclusion that emerges from this considerable body of literature is that the modern-day Native villages like Noatak and Circle are the successors to the "tribes" or "nations" which occupied these same areas since time immemorial. These are the facts and conclusions upon which Congress relied in crafting the 1971 settlement of Alaska Native tribal land claims.

Given the conclusive data presented by the Field Commission, and confirmed by other work, it is clear Congress has been well aware that in dealing with the villages, it has been treating with *tribes* which in all relevant respects are identical to those it has treated with elsewhere in the United States. Any contrary determination would be at odds with the overwhelming evidence from existing historical, ethnological and anthropological literature—and more importantly, with the very information provided to Congress in crafting ANCSA.

Congress's manner of treating with the Native Villages was identical to the method it traditionally employed when dealing with other tribal land claims;

The consistent policy of the United States in its dealings with the Indian Tribes has been to grant them title to a portion of the lands which they occupied, to extinguish the aboriginal title to the remainder of the land by placing such land in the public domain, and to pay the fair value of the title extinguished.

H.R. Rep. No. 523, 92d Cong., 1st Sess. 4 (1971). Congress thus granted the Natives title to some land, extin-

³⁰ See, e.g., Caulfield at 127-31 (Chalkytsik). For instance, like many other maritime villages devastated by Alaska's 1964 earthquake, *amicus* Native Village of Chenega established a new village nearby.

guished aboriginal title to the remainder, and paid the Natives some one billion dollars for that extinguished title.³¹ Congress, in short, clearly understood and treated with the villages as *tribes*.³²

Congress' identification of the eligible villages in ANCSA therefore entails two basic conclusions. First, since only tribes may hold (and therefore cede) aboriginal title, Congress necessarily determined those villages to be the relevant tribal entities.³³ Second, Congress

³¹ See generally 43 U.S.C. 1601 et seq. Congress did make one departure from its usual practice: it provided that the cash and lands would be managed largely by village corporations established by the tribes themselves. The use of corporations as stewards of the land settlement is not dissimilar from the special federal corporations authorized to be established under Section 17 of the 1934 Indian Reorganization Act, 25 U.S.C. 477. In both instances Congress viewed the corporate form as holding considerable promise for guaranteeing the future economic self-sufficiency of Alaska Natives and American Indians, and in both instances special provisions were made to protect the tribal estate. Compare 43 U.S.C. 1606(h) (generally prohibiting alienation of Native stock and providing that stock inherited by non-Natives "shall not carry voting rights"); 1620(d) (exempting undeveloped settlement lands from taxation for twenty years); and 1636(d) (exempting forever all undeveloped settlement lands from third party claims of adverse possession, from real property taxes, and from judgment execution); with 25 U.S.C. 476 (confirming power of IRA-organized tribe "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe").

³² In its deliberations over ANCSA Congress was well aware of the Federal Government's trust responsibility to Alaska "tribes," a trust underlying the provision of hundreds of millions of dollars in Native health, education and social service programs. Ultimately Congress rebuffed suggestions the tribal trust should be terminated in the settlement as being inconsistent with the current era of Indian self-determination. See, e.g., 116 Cong. Rec. 24217, 24220-24227, 24234-24235, 24378-24381 (debates between Senators Gravel, Harris, Hollings, Stevens, Kennedy and Jackson on S. 1830) (daily ed. July 14-15, 1970).

³³ Contrary to Petitioner's suggestion, Pet. Br. at 35, Congress expressly limited the land claims settlement to tribal villages "not

found as a matter of law that those villages were "distinctly [Native] communities," *Sandoval*, 231 U.S. at 46.³⁴ As such, like the recognized tribes of the "Lower 48" states, there simply is no occasion for requiring each Native village in Alaska to prove its distinctly Native character.³⁵ Congress made that judgment in ANCSA, a factual and political determination that is far from arbitrary and hence binding on this Court.

C. The Tribal Status of Alaska Native Villages Is Demonstrated by the Federal Government's Repeated Recognition of that Status and by the Extensive Governmental Activities The Villages Now Undertake.

1. Since the Alaska Native Claims Settlement Act of 1971 Congress and the Executive Branch have Repeatedly Recognized the Tribal Status of the Alaska Native Villages Identified in ANCSA.

The tribal status of the ANCSA villages has been recognized in virtually all modern Indian legislation enacted since 1971. For instance, in the 1978 Indian Child Welfare Act ("ICWA"), 25 U.S.C. 1901 *et seq.*, Congress recognized the tribal status and governmental authority of "any Alaska Native village [identified in ANCSA],

of a modern and urban character, [where] a majority of the residents are Natives." 43 U.S.C. 1610(b)(2)(B), (b)(3)(B). Southeast tribes whose claims had previously been adjudicated by the U.S. Court of Claims also participated in the settlement, albeit on a more limited basis than tribes elsewhere, 43 U.S.C. 1615(a), (b) and (c).

³⁴ See also *Alvarado v. State*, 486 P.2d 891, 899-900 (Alaska 1971) (remarking on the "stark contrast" and "enormous gulf" existing between Native villages and other Alaskan communities).

³⁵ The Ninth Circuit's suggestion otherwise in *Native Village of Venetie v. State of Alaska*, No. 88-3929, Slip Op. at 13600-604, — F.2d — (9th Cir. Nov. 6, 1990) is wrong. Clearly this Court has never made any distinction between recognized tribes which are modern-day successors to so-called "historic tribes," and those which are not. See discussion, *supra* at — n. —. Compare *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (involving a non-historic tribe) with *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (an historic tribe).

25 U.S.C. 1903(8). In doing so Congress specifically reconfirmed village tribal authority in the area of domestic relations jurisdiction over tribal children, an essential attribute of the retained sovereignty of Native American tribes. *Fisher v. District Court*, 424 U.S. 382 (1976); *United States v. Quiver*, 241 U.S. 602 (1916).

More recently, in the 1986 Superfund Amendments and Reauthorization Act, 42 U.S.C. 9601(36), Congress identified *Alaska Native villages* as tribes when it expanded the Act's scope to authorize the Environmental Protection Agency to treat tribes as states for various environmental purposes (such as the clean up of hazardous waste sites and responding to hazardous spills).³⁶ Again, only this month President Bush signed into law the 1990 Clean Air Act Amendments, putting all tribes, including *Alaska Native villages*, exercising "substantial governmental duties and powers" over any "area[s] within the tribe's jurisdiction" on an equal footing with states for most purposes.³⁷

Whether the subject has involved such specific essential governmental functions as domestic relations jurisdiction and environmental protection programs, or simply general governmental activities such as the training, strengthening and improvement of tribal governments and their employees,³⁸ Congress has time and again delib-

³⁶ To the extent some aspects of the Act's tribal provisions may be limited to lands owned by or under the jurisdiction of a tribe, clearly many Alaska tribes would qualify. See *e.g.* 43 U.S.C. 1615(d)(1) (lands owned by Chilkat Indian Village); *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1390-91 (9th Cir. 1988) (holding tribal civil jurisdiction over non-reservation lands turns on whether such lands qualify as a "dependent Indian community" under 18 U.S.C. 1151).

³⁷ See Secs. 107(b), (d), Pub. L. 101-549, amending 42 U.S.C. 7601(d), 7602(r). See also the Solid Waste Disposal Act, 42 U.S.C. 6903(13)(A) (treating Alaska Native villages identically with other Indian tribes for financial assistance and other purposes).

³⁸ See Intergovernmental Personnel Act of 1971, as amended, 42 U.S.C. 4701, 4762(5).

erately acknowledged the Alaska villages defined and identified in ANCSA to be "tribes" on an equal footing with other Indian tribes,³⁹ an overwhelming course of dealing

³⁹ See e.g. 5 U.S.C. 3371(2)(C) (relating to assignment of federal personnel to tribal governments under the Intergovernmental Personnel Act); 13 U.S.C. 181, 184(1) (treating every "Alaska Native village" as a "local unit of general purpose government" under the Census Act); 20 U.S.C. 4402(5) (relating to tribal involvement in the Institute of American Indian and Alaska Native Culture and Arts Development); 25 U.S.C. 472a(f)(1)(A) (relating to the authority of a tribal organization to waive the Indian preference laws applicable to positions within the Bureau of Indian Affairs and the Indian Health Service); 25 U.S.C. 1452(c) (access to revolving loan fund, loan-guaranty and loan insurance programs established under the Indian Financing Act of 1974); 25 U.S.C. 2011(f)(2)(A) (authority of tribal organization to waive Indian preference laws applicable to BIA educators under 1978 Indian Education Act); 29 U.S.C. 1671(c)(1)(A) (tribal participation in comprehensive training and employment programs established under the Job Training Partnership Act); 42 U.S.C. 5122(6) (addressing Native villages as local governments in the Disaster Relief Act); 42 U.S.C. 5302(a)(17) (including Alaska Native Villages as tribes in the Housing and Community Development Act); 42 U.S.C. 6707(a)(1), (h)(2)(B) (targeting Alaska Native villages in the Public Works Employment Act tribal set-aside program); 42 U.S.C. 6723(c)(3)(D)(ii) (extending local government emergency support payments under the Public Works Act to tribes, including any "Alaska Native village"); Sec. 2(7) of the Native American Grave Protection and Repatriation Act of 1990, Pub. L. 101-601; Sec. 105(d)(3), Title I, Pub. L. 101-644 (Indian Arts and Crafts Act of 1990).

See also 23 U.S.C. 101 (deeming Alaska Native villages on the same footing as Indian reservations for purposes of the Federal-Aid Highway Act); 29 U.S.C. 750(d) (deeming handicapped Native Americans residing on ANCSA corporate lands to be eligible beneficiaries of special vocational rehabilitation grant programs administered by tribes); 42 U.S.C. 2992c(2) (Native American Program Act) (equating lands under jurisdiction of Alaska Native village tribes, including ANCSA corporate lands, with Indian reservations); 42 U.S.C. 5318(n)(2)(A) (equating Alaska Native village tribes with reservation-based tribes in the Urban Development Action Grant Program); Secs. 403(9), 409 of Title IV, Pub. L. 101-630 (Indian Child Protection and Family Violence Prevention Act) (treating ANCSA corporate lands identically to Indian reser-

which petitioner elects to ignore.⁴⁰ Those statutes, and the hundreds of millions of dollars annually appropriated to and for the benefit of Alaska Native village tribes, draw their constitutional authority from Congress's power under Article I, sec. 8, cl. 3 of the Constitution "to regulate Commerce . . . with the Indian Tribes" (emphasis added). Since Congress's constitutional authority to provide benefits and to legislate with respect to Native Americans is based on the *political* relationship with their

vation lands for purposes of funding village tribal child abuse treatment grant programs).

Each of these statutes deliberately distinguishes and excludes the village corporations established under ANCSA. In other statutes, however, special concerns have led Congress to make ANCSA corporations eligible for a particular program. See, e.g., Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450, 450b((e) (adding ANCSA corporations to the Act's provisions would extend to certain urban areas such as Anchorage where there may not have existed any recognized tribe, see *Cook Inlet Native Assn. v. Bowen*, 810 F.2d 1471, 1475 (9th Cir. 1987)); 15 U.S.C. 637(a)(13) (making the tribal minority contractor provisions of the Small Business Act also available to ANCSA corporations).

⁴⁰ Petitioner only cites to the Clean Water Act, 33 U.S.C. 1377 and the Resource Conservation and Recovery Act, 42 U.S.C. 6901, statutes which are not inconsistent with this course of dealing. Pet. Br. at 36 n. 41. Despite the unusually restrictive definition of "Indian tribe" in 33 U.S.C. 1377(h)(2) of the Clean Water Act, clearly Alaska Native villages defined in ANSCA are eligible for the waste and sewage treatment grant programs specified in subsection (c) (expressly including "Alaska Native Villages"). Whether an Alaska tribe can qualify to be treated as a state under one of the alternatives in subsection (e) by establishing that it occupies a "reservation" is uncertain, although the disclaimer (addressing tribal powers, but not tribal status) in subsection (g) secured by the Alaska congressional delegation would appear to be unnecessary if the villages had been categorically excluded as a matter of law. Moreover, that aspects of a statutory program may, by congressional directive, not apply to Alaska tribes hardly supports the proposition that the villages are not really tribes in the first place. As for the Resource Conservation and Recovery Act, the State is simply wrong: the Act's definition of tribes clearly includes Alaska Native villages, 42 U.S.C. 6903(13)(A).

tribes, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974), the fact that the benefits are provided to Alaska Native villages itself is cogent proof of the Native villages' tribal status. *Sandoval*, 231 U.S. at 23, 39-41, 46-47. See also *Smith and Kancewick* at 480-82, 514-15.⁴¹

In exercising its delegated responsibility for determining which recognized Native American tribal entities may secure the benefit of certain legislation, the Executive Branch has likewise consistently determined that all the Native villages listed in ANCSA exercise substantial tribal governmental functions for such purposes as tax exemptions, revenue sharing, and law enforcement.⁴² Similarly, virtually every department of the Federal Government views and deals with the Alaska villages identified in ANCSA as recognized tribal governments.⁴³ These de-

⁴¹ Petitioner would create a novel new doctrine of federal Indian law: a "tribe" may be recognized only for certain purposes, and to be a fully recognized tribe, Congress must somehow do more than recognize the tribe's status as such in one or more particular contexts. Thus, like the elusive partial pregnancy, a Native community can be partly a tribe and partly not.

There is simply no such doctrine. The issue in this Court has never been whether a tribe is recognized as such in a particular context just for a particular purpose. Rather, the issue consistently has been whether, as a recognized tribe, a tribe possesses a particular authority or immunity. See, e.g., *United States v. Wheeler*, 435 U.S. 313 (1978). Petitioner's misplaced reliance on certain "disclaimer" clauses goes to this issue of tribal powers, not the issue of recognized tribal status. Pet. Br. at 35. By contrast, the extent of Respondents' tribal powers, and the degree to which Congress may have legislated with respect to those powers, are issues not directly implicated in this case.

⁴² See respectively, 26 U.S.C. 7701(40) and 26 C.F.R. 305.7701-1; Rev. Proc. 83-87; and Rev. Proc. 86-17; 31 U.S.C. 6701(a)(5)(B) (repealed April 7, 1986, Pub. L. 99-272, Title XIV, Sec. 14001(a)(1), 100 Stat. 327); 42 U.S.C. 5603(a) and *Department of Justice Law Enforcement Assistance Administration, Determination of Eligibility of Alaska Native Villages*, 45 Fed. Reg. 46581 (July 10, 1980).

⁴³ See e.g., 13 C.F.R. 316.2 and 317.2 (Economic Development Administration (EDA) local public works programs); 13 C.F.R. 318.2 (EDA community emergency drought relief program); 24

C.F.R. 571.4(k) (Housing and Urban Development (HUD) community development block grants); 24 C.F.R. 596.3 (HUD enterprise zone development program); 26 C.F.R. 305.7701-1(a) (Internal Revenue Service Indian Tribal Government Tax Status Act program); 31 C.F.R. 51.2(j) (Treasury Department local government financial assistance program); 31 C.F.R. 52.2(h) (Treasury Department antirecession local government program); 44 C.F.R. 205.251(b) (Federal Emergency Management Agency disaster assistance program); 45 C.F.R. 1061.51-3(i) (Department of Health and Human Services (DHHS) crisis intervention program); 45 C.F.R. 1336.10 (Administration for Native Americans programs) (see also 55 Fed. Reg. 49004 (November 23, 1990) (special ANA Alaska initiative established in part to "strengthen village government" and generally improve village tribal self-governance)).

See also 5 C.F.R. 334.102 (Office of Personnel Management (OPM) regulations under the Intergovernmental Personnel Act); 7 C.F.R. 1944.656(g)(2) (Farmers Home Administration); 7 C.F.R. 3015 App. A (Department of Agriculture (DOA) federal assistance); 7 C.F.R. 3016.3 (DOA uniform administrative requirements for grants and cooperative agreements to local governments); 10 C.F.R. 600.3 and 600.402 (Department of Energy uniform administrative requirements for grants to local governments); 13 C.F.R. 143.3 (Small Business Administration uniform administrative requirements for grants to local governments); 15 C.F.R. 24.3 (Department of Commerce uniform administrative requirements for grants to local governments); 22 C.F.R. 135.3 (State Department uniform administrative requirements for grants to local governments); 24 C.F.R. 85.3 (HUD uniform administrative requirements for grants to local governments); 25 C.F.R. 23.2(i) (Department of Interior (DIO) Indian Child Welfare Act program); 25 C.F.R. 26.1(h) (DOI adult employment assistance program); 25 C.F.R. 27.1(j) (DOI adult vocational training program); 25 C.F.R. 256.2(f) (DOI housing improvement program); 28 C.F.R. 66.3 (Department of Justice uniform administrative requirements for grants to local governments); 29 C.F.R. 97.3 (Department of Labor (DOL) uniform administrative requirements for grants to local governments); 29 C.F.R. 1470.3 (Federal Mediation and Conciliation Service uniform administrative requirements for grants to local governments); 32 C.F.R. 278.3 (Department of Defense uniform administrative requirements for grants to local governments); 34 C.F.R. 80.3 (Department of Education (DOE) uniform administrative requirements for grants to local governments); 34 C.F.R. 221.71 (DOE school construction program); 36 C.F.R. 1207.3 (National Archives uniform administrative requirements for grants to local governments); 38 C.F.R. 43.4 (Veterans

partmental actions echo the longstanding position of the Secretary of the Interior that Alaska Native villages are

Administration uniform administrative requirements for grants to local governments); 40 C.F.R. 31.3 (Environmental Protection Agency uniform administrative requirements for grants to local governments); 45 C.F.R. 74.3 (DHHS grant regulations); 45 C.F.R. 92.3 (DHHS uniform administrative requirements for grants to local governments); 45 C.F.R. 1061.50-9(f) (DHHS community food and nutrition program); 45 C.F.R. 1157.3, 1174.3 and 1183.3 (National Foundation on the Arts and Humanities uniform administrative requirements for grants to local governments from the National Endowment for the Arts, the National Endowment for the Humanities and the Institute for Museum Services); 45 C.F.R. 1207.1-2 (DHHS senior companion program); 45 C.F.R. 1208.1-2 (DHHS foster grandparent program); 45 C.F.R. 1234.3 (DHHS uniform administrative requirements for grants to local governments); 45 C.F.R. 2015.3 (Commission on the Bicentennial of the U.S. Constitution uniform administrative requirements for grants to local governments); 49 C.F.R. 18.3 (Department of Transportation (DOT) uniform administrative requirements for grants to local governments).

To the same effect, the Equal Employment Opportunity Commission has consistently ruled that Alaska villages are tribes under the "Indian Tribe" exemption to the 1966 Civil Rights Act, 42 U.S.C. 2000e(b). *Aloysius v. Yukon-Kuskokwim Health Corporation*, No. 380-880-972 (E.E.O.C. Seattle Dist. Apr. 15, 1988); *Zharoff v. Kodiak Area Native Assn.*, No. 380-880-136 (E.E.O.C. Seattle Dist. Mar. 11, 1988); *Wuitschick v. Copper River Native Assn.*, No. 380-880-216 (E.E.O.C. Seattle Dist. Mar. 11, 1983) (all involving multi-tribal confederations).

See also 24 C.F.R. 600.7(g) (HUD comprehensive planning assistance program); 24 C.F.R. 913.102 (HUD public and Indian housing programs); 25 C.F.R. 81.1(w) (DOI tribal reorganization under a federal statute); 25 C.F.R. 87.1(g) (DOI use or distribution of Indian judgment funds); 25 C.F.R. 101.1(e) (DOI revolving loan fund program); 25 C.F.R. 151.2(b), (c) (DOI land acquisition program); 25 C.F.R. 286.1(h) (DOI Indian business development program).

See also 43 C.F.R. 4300.0-5 (DOI reindeer grazing program); 50 C.F.R. 173 (DOI endangered and threatened wildlife program); 50 C.F.R. 18.3 (DOI marine mammal program); 50 C.F.R. 215.2 (National Marine Fisheries Service (NMFS) Pribilof Islands, Alaska marine mammal program); and 50 C.F.R. 216.3 (NMFS marine mammal program) (all containing definitions of "Alaska Native").

self-governing tribes with the power to regulate the affairs of their citizens.⁴⁴ In the face of this formidable record it is simply far too late in the day to seriously question the Federal Government's consistent treatment of the Native villages, including Respondents Noatak and Circle, as recognized tribes.⁴⁵

⁴⁴ See 47 Fed. Reg. 53133-34 (Nov. 24, 1982); 48 Fed. Reg. 5682, 5686 (Dec. 23, 1983); 50 Fed. Reg. 6055 (Feb. 13, 1985); 51 Fed. Reg. 25115 (July 10, 1986); 53 Fed. Reg. 52829 (Dec. 29, 1988) (all listing the ANCSA villages as federally recognized tribes, and the latter adding the ANCSA corporations due to their eligibility under certain statutes); *Aboriginal Fishing Rights in Alaska*, 57 I.D. 461 (1942); *Status of Alaskan Natives*, 53 I.D. 593, 605 (1932); *Hearings Before the Subcomm. of the Senate Comm. on Interior and Insular Affairs on S. 2037 and S.J. Res. 162*, 80th Cong., 2d sess. 149 (testimony of Theodore H. Haas, Chief Counsel, Bureau of Indian Affairs on proposals to repeal the IRA), 434-449 (setting forth 1945 ruling of Harold L. Ickes, Secretary of the Interior on resolving certain claims of the Hydaburg, Klawock and Kake Indians), 582-583 (testimony of Mastin G. White, Solicitor, Dept. of the Interior, discussing Alaska tribal aboriginal rights); *Validity of Marriage by Custom Among the Natives or Indians of Alaska*, 54 I.D. 39, 42 (1932); and 51 Fed. Reg. 28779 (Aug. 11, 1986); 48 Fed. Reg. 21378 (May 12, 1983); 48 Fed. Reg. 30195 (June 30, 1983) (setting forth the Secretary's approval of tribal liquor ordinances for Minto, Chalkytsik and Northway, respectively, pursuant to 18 U.S.C. 1161).

⁴⁵ Congressional treatment long preceding ANCSA further supports this conclusion. See e.g., Section 8 of the First Organic Act of May 17, 1884, c. 53, 23 Stat. 24 (discussed in *Tee-Hit-Ton v. United States*, 348 U.S. at 278; *United States v. Berrigan*, 2 Ak. Rpts. 442 (D. Alaska 1904)); Section 27 of the Second Organic Act of June 6, 1900, c. 786, 31 Stat. 321 (also discussed in *Tee-Hit-Ton*); Alaska Native Allotment Act of 1906, c. 2469, 34 Stat. 197 (granting Alaska Natives rights to land allotments similar to those afforded tribal Indians elsewhere); the Snyder Act of November 2, 1921, c. 115, 42 Stat. 208, 25 U.S.C. 13 (authorizing appropriations for the general support of Indian tribes); the Native Townsite Act of 1926, c. 379, 44 Stat. 629 (providing for conveyance of public lands by restricted title to Natives in townsites); the Indian Reorganization Act of 1934, 25 U.S.C. 476, 479 (authorizing Alaska tribes to reorganize their tribal governments), 473a (amending the Act to facilitate its application to village tribes); the Reindeer Industry Act of 1937, c. 897, 50 Stat. 900, 25 U.S.C. 500-500 (providing for

2. Congressional and Executive Branch Recognition of the Tribal Status of Alaska Native Villages is Consistent with the Activities of the Tribes Today.

There is no clearer reflection of the tribal status of Alaska Native villages than in the present day activities of their tribal governments in protecting and advancing the health and welfare of their people. For instance, Alaska tribes and confederations staff and administer dozens of clinics and hospitals across the state, providing such services as general hospitalization and medical care, maternal child health programs, prematernal and child delivery care, consumer education, and dental and eye care. They also provide hepatitis immunization, environmental health programs, substance abuse treatment, accident prevention and emergency medical programs, mental health counseling and an extensive tribally-based community health aide program. With BIA-funded contracts, ANA-funded grants, and other sources Alaska's tribes also administer programs for agricultural assistance, adult basic education, higher education scholarships, direct employment, adult vocational training and housing improvement assistance.⁴⁶ Among a wide range of other tribal govern-

the Secretary's acquisition of all reindeer in Alaska and their subsequent distribution to Natives); Section 4 of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, *as amended*, 73 Stat. 141, 48 U.S.C. prec. 21 note (requiring the State to disclaim any right or title to Native occupied lands, leaving their disposition to the Federal Government and exempting Native lands from state taxation); Public Law 83-280, *as applied* to Alaska in 1958, codified in part at 18 U.S.C. 1162(a) and 28 U.S.C. 1360(b) (granting Alaska criminal jurisdiction in Indian country and civil jurisdiction over causes of action arising in Indian country but withholding any authority for state taxation of restricted Native tribal property).

⁴⁶ Some, like *amicus* Native Village of Tanana, annually administer hundreds of thousands of dollars in IHS and BIA programs serving tribal members. Other villages band together into confederations to achieve economies of scale, as is the case with the Tanana Chiefs Conference (TCC), a coalition of some 40 Athabaskan tribes in the Interior of Alaska. In federally funded health care programs alone, TCC annually administers \$11 million in programs.

ment services are state court intervention and tribal court management in children's cases subject to the Indian Child Welfare Act,⁴⁷ family counseling, child advocacy and increasingly active trial and appellate tribal court systems.

Not surprisingly, Alaska's tribal governments engage in the usual and customary activities of any small local government.⁴⁸ These include such mundane matters appropriate to village life as regulating all-terrain vehicle use, animal control problems, alcohol and illicit drug use, curfews, and other matters protective of the general welfare of the community. They provide by ordinance for the election of council members and other elected tribal officials and for the determination of tribal citizenship. They raise governmental funds through a variety of means, including taxes,⁴⁹ user fees, bingo revenues and business ventures. They provide such basic necessities as fuel and water, and operate and maintain fire departments. They use tribal funds to build clinics, employ staff and evacuate emergency patients by air transport to medical facilities in Fairbanks or Anchorage. They employ village public safety officers, adjudicate civil disputes and minor crimes, operate water treatment programs, operate tribal courts, collect sales taxes and carry out alcohol control measures (including tribal liquor ordinances certified and approved by the Secretary of the Interior under 18 U.S.C. 1161). Some administer tribal employment rights ordinances to maximize Native hire in village-based projects. Most also administer substan-

⁴⁷ 25 U.S.C. 1901 *et seq.* Many of the villages in Alaska participate in ICWA cases, and have adopted children's codes and other family ordinances.

⁴⁸ Approximately one-half of the Alaska tribes are situated outside any state-chartered local government; their traditional governments are thus the only active governments in their villages. In these areas the State recognizes their tribal governments as the only elected leadership for the administration of state-funded local programs.

⁴⁹ For example, as part of a growing trend, *amicus* Native Village of Akiachak administers a local sales tax to support general government services.

tial state-appropriated funds as a key partner with the State in forging comprehensive and effective local governance.

In one example typical of many Native villages, *amicus* Native Village of Tatitlék in Prince William Sound (near the EXXON VALDEZ tanker disaster) runs government programs and facilities; acquires and disposes of real property; raises and spends government funds; regulates land use, play areas and the cemetery; intervenes in child welfare matters; administers day care services; operates a clinic; administers sewer and solid waste facilities; provides community utilities (including electric, water and home heating oil); maintains roads and an air field; issues licenses; regulates alcohol; enforces animal control ordinances; and carries out all the other services and programs incident to the governance of a 120-member tribe.

Tribal governments in the Northwest Alaska Inupiaq and Gwitch'in regions are typical. The eleven villages in the Northwest Arctic exhibit varying degrees of tribal governmental activity. For instance, as early as 1908 Noatak had in place a seven-member tribal council which passed regulations governing such matters as house location, lot size, sanitation and dog control.⁵⁰ The current Tribal Council is organized under the IRA and is the sole governing body for the Village. Among other things, it operates the local utilities⁵¹ and is currently engaged in the construction of a multimillion dollar water and sewer project through the Federal Emergency Management Agency.

Amicus Native Village of Kotzebue is the largest tribe in this region with some 1,800 members, most of whom live in Kotzebue. The Tribe operates a wide array of programs under BIA contracts to provide higher educa-

⁵⁰ See generally Case at 443 and materials cited therein.

⁵¹ See Noatak Utility Board Rules & Regulations for Utility Services adopted August 29, 1990 (copy lodged with the Clerk of the Court). See also Noatak Ordinance No. 90-01.

tion, housing improvement and employment assistance. The Tribe also employs a full-time social worker to administer activities under the Indian Child Welfare Act, including regular intervention in state court children's proceedings, investigation of foster and pre-adoptive placements, and related home studies. The other villages in the region are similarly active.⁵²

The governmental activities of the Gwitch'in tribes are equally extensive. The Circle Village Council is the sole government in Circle, and works cooperatively with the Circle Civic Association. The Council currently is administering a federal housing grant and a grant to build an electrical line. It is also administering a state-federal grant to build a washerateria and shower facility. The Council intervenes in ICWA cases and is presently redesigning its tribal court.

Amicus Native Village of Venetie is perhaps the most active of all of the Gwitch'in tribes. The Venetie Tribal Council owns 1.4 million acres comprising its former reservation and has developed numerous ordinances governing those lands, such as the control of gambling, a prohibition on alcohol, and regulation of family relations,

⁵² For instance, *amicus* Village of Selawik is organized under the IRA and has adopted ordinances governing tribal member enrollment (Ordinance 88-01) and the Akuligaaq Tribal Court. See generally Native Village of Selawik Ordinance No. 87-01. As is typical of any villages it administers a contract from the Bureau of Indian Affairs to support the operation of its tribal government. Selawik IRA Council Contract No. E00C14203174 (Fiscal Year 1989). *Amicus* Kiana Village organized under a tribal constitution adopted by the tribal members, had a budget in 1988 of \$94,000 from the Bureau of Indian Affairs to operate village governmental programs including higher education, tribal operations, housing improvement, employment and vocational education programs. The tribe also operates the Katyaak Tribal Court. Kiana Ordinance No. 86-01, December 11, 1986. *Amicus* Native Village of Kivalina, also organized under the IRA, was recently awarded a two-year \$80,000 grant from the ANA to "enable the Kivalina IRA Council to develop a tribal infrastructure and council training for the Native village." See ANA Award No. 10NA0171/01 (June 9, 1990).

animal control, speed limits and hunting. These ordinances are a codification of traditional law, and their application and enforcement is subject to the rulings of the Venetie Tribal Court. The Council also regulates general relations among the members, operates the airports, leases land to the schools and levies taxes.⁵³

The foregoing profile of the Northwest Arctic and Gwitch'in tribes is typical of other tribes throughout Alaska. Congress with good reason identified the Alaska Native tribes in ANCSA: that recognition accorded with their history. And with good reason Congress has repeatedly since ANCSA supported the tribes' modern-day activities of self-government. Bolstered and strengthened by a multitude of federal programs and federal initiatives implemented since 1971, these tribes are the linchpin of Alaska Native self-determination today. The Ninth Circuit recognized this when it correctly concluded that if the Eleventh Amendment is not a bar to the Respondents' suit, they are as fully entitled to redress the deprivation of their tribal rights in federal court as any other recognized Native American tribe.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

⁵³ Similarly *amicus* Native Village of Fort Yukon manages approximately \$700,000 in grants per year, including capital improvement, self-determination, land management and a radio station, and has enacted a child-in-need-of-aid ordinance. It has also established a tribal court which issues adoption decrees. *Amicus* Beaver has promulgated extensive ordinances in such areas as speed limits, animal control and discharge of firearms. It also engages in housing rehabilitation activities and has established a tribal court for ICWA cases.

Respectfully submitted,

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